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No.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

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IN THE MATTER OF
FLORENCE ANNE BRIGGS, PETITIONER

---

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF INDIANA

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FLORENCE ANNE BRIGGS
P.O. Box 2
Flora, IN 46929
(219) 967-3630

Pro Se

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## QUESTIONS PRESENTED

(1) WHETHER A STATE CONSISTENT WITH THE 5TH, 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION MAY REQUIRE TWO SEPARATE DISCIPLINARY ACTIONS INVOLVING SEPARATE ISSUES AND CLAIMS TO BE TRIED TOGETHER UNDER THE GUISE OF JUDICIAL ECONOMY SIMPLY BECAUSE THE RESPONDENTS ARE SPOUSES AND PARTNERS IN THE SAME LAW FIRM.

(2) WHETHER IT IS FUNDAMENTALLY UNFAIR SO AS TO OFFEND THE DUE PROCESS CLAUSE OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO DISCIPLINE AN ATTORNEY BY INFUSING THE ACTS OF ANOTHER ATTORNEY ON HER SIMPLY BECAUSE OF HER MARITAL RELATIONSHIP WITH THAT ATTORNEY.

(3) WHETHER A STATE MAY DISCIPLINE AN ATTORNEY FOR GIVING PRUDENT LEGAL ADVICE TO HER CLIENT BY PRESUMING SUCH ADVICE TO BE TAINTED WITH INFIRMITY SIMPLY

BECAUSE THE CLIENT IS HER HUSBAND, CONSISTENT WITH DUE PROCESS, EQUAL PROTECTION AND THE FREE SPEECH GUARANTEES OF THE UNITED STATES CONSTITUTION.

(4) WHETHER IT IS FUNDAMENTALLY UNFAIR TO HOLD DISCIPLINARY PROCEEDINGS OVER THE HEADS OF LAWYER-SPOUSES FOR ALMOST TEN YEARS BEFORE MAKING A JUDGEMENT.

(5) WHETHER A STATE MAY DISREGARD ITS OWN PROCEDURAL RULES WHEN SEEKING TO DISCIPLINE AN ATTORNEY WITHOUT VIOLATING PROCEDURAL DUE PROCESS MANDATED BY THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(6) WHETHER A LAWYER'S RIGHT AND RESPONSIBILITY OF ZEALOUS ADVOCACY IS PROTECTED SPEECH UNDER AMENDMENTS 1 AND 14 TO THE UNITED STATES CONSTITUTION REGARDLESS OF THE NAME OF THE CLIENT.

(7) WHETHER INDIANA DISCIPLINARY PROCEDURES AS APPLIED ARE SO FUNDAMENTALLY UNFAIR AS TO VIOLATE DUE PROCESS.

(8) WHETHER INDIANA DISCIPLINARY PROCEDURE WHEREBY THE SAME ARM OF THE STATE NOT ONLY PROSECUTES BUT ALSO HEARS THE CASE, FINDS THE FACTS, REVIEWS THE CASE, AND ASSESSES COSTS ON UNSUCESSFUL ATTORNEYS, IS CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION.

## LIST OF PARTIES

The Parties below are:

Florence Anne Briggs, Petitioner here, Respondent below.

The Disciplinary Commission of the Supreme Court of the State of Indiana, as an arm of said Court.

Copies of this Petition for Writ of Certiorari are being sent to the State of Indiana by its Attorney General, Linley Pearson.

A Complaint for Misconduct was filed by the Disciplinary Commission of the Indiana Supreme Court against Florence Anne Briggs, resulting in the suspension of her license to practice law.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

NO.

IN THE MATTER OF
FLORENCE ANNE BRIGGS, PETITIONER

---

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

---

Florence Anne Briggs, pro se petitions for a writ of certiorari to review the judgement of the Supreme Court of the State of Indiana.

## OPINIONS BELOW

The opinion of the Supreme Court of Indiana (App.B, infra) is reported at 502 N.E.2d 890. The report of the hearing officer (App.C, infra) is not reported.

## JURISDICTION

The judgment of the Indiana Supreme Court (App.B, infra) was entered on January 13, 1987. A petition for temporary stay (App.E, infra) was denied

on February 12, 1987. A petition for modification (to reduce suspension time and/or to have suspensions served sequentially not concurrently) (App.E, infra) was denied on February 25, 1987. On April 6, 1987, Justice John Paul Stevens extended the time within which to file a petition for a writ of certiorari to June 12, 1987. The jurisdiction of this Court is invoked under 28 USC Sec. 1257 (3).

Review of constitutional rights in a disciplinary proceeding is by direct appeal to the United States Supreme Court. Theard v. U.S., 77 S.Ct. 1274, 354 US 278, 1 L.Ed.2d 1342 (1957); 7A CJS 113.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Amendments to the United States Constitution provide in relevant part:

1st Amendment: Congress shall make no law...abridging the freedom of speech....

5th Amendment: No person shall...be deprived of life, liberty or property, without due process of law....

9th Amendment: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

14th Amendment: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 7 Sec. 4, Indiana Constitution: The Supreme Court has original jurisdiction in law admission; discipline or disbarment of those admitted.

AP Rule 4(1), Indiana Rules: The Indiana Supreme Court has jurisdiction to assess discipline.

Indiana disciplinary rule AD 23 provides in relevant part:

> (a) Sec. 6(a): The Disciplinary Commission is appointed by the Supreme Court of Indiana.
>
> (b) Sec. 10: The Commission appoints the Executive Secretary with the approval of the Indiana Supreme Court.

(c) Sec. 9(b): The Executive Secretary appoints the staff.

(d) Sec. 10: When a grievance is filed which raises a substantial question of misconduct the Executive Secretary sends a copy of same to attorney who has 20 days to answer same.

(e) Sec. 10(b)(c): After notice to the Lawyer-Respondent, preliminary investigation and response from Respondent, the cause is docketed, investigated and a report is made to the Commission.

(f) Sec. 10(d): In the event that charges of misconduct are not contained in the grievance, the Executive Secretary shall notify the Respondent who shall have an additional 20 days to respond.

(g) Sec. 13(a): After a Complaint is filed, the Supreme Court of Indiana appoints a hearing officer.

(h) Sec. 13: The Hearing Officer shall conduct a hearing on a complaint of misconduct within 60 days after he is appointed and has qualified.

(i) Sec. 14(f): The Hearing Officer submits findings of facts and written recommendations to the Indiana Supreme Court.

(j) Sec. 15(a): The Supreme Court examines the report of the Hearing Officer and enters judgment.

(k) Sec. 16: The Executive Secretary prepares a statement of expenses allocable to each case which Respondent is ordered to pay.

STATEMENT

In October of 1978 a Disciplinary Complaint was filed against William J. Briggs (W.J. Briggs) spouse of Florence Anne Briggs (F.A. Briggs), following the filing of a grievance against both spouses in July 1977. (The grievance against F.A. Briggs was found to be without merit). The Complaint lay dormant until July 19, 1983, when it was escalated and amended and on that very same date a Disciplinary Complaint was filed against F.A. Briggs based, in large part, on the Complaint against W.J. Briggs. In the Complaint against her, F.A. Briggs was referred to as "wife," "spouse" and "law partner" of

W.J. Briggs.

The Complaint against F.A. Briggs followed a grievance filed in May of 1981 and was authorized by the Commission for filing in September of 1982, but was not filed until July 19, 1983, and hearing was held in July of 1984 in a forced joint trial with her husband.

The grievances and complaints against the spouses were all related to circumstances surrounding W.J. Briggs representation of an elderly client and were the only ones filed against the parties since their respective admissions to practice law in 1954 and 1958.

A single hearing on both complaints was required over the objections of both parties.*

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* (a) A Petition of Change of (Joint) Hearing Officer was filed 9/19/83; denied 10/6/83. (App.J, infra)

(b) Motion for Bifurcated (Separate) Hearing was filed 12/7/83; denied. (App.G, infra)

(c) Motion to Separate for Trial, Motion for Jury Trial filed 7/5/84; denied 7/6/84.

(d) Presented as due process and equal protection violation. (App.C,-67 infra) denied 6/4/84.

(e) Moved to strike from complaint all materials not identical to materials contained in complaint against W.J. Briggs 7/12/84.

(f) Renewed Motion for separate trial (this was during course of trial), motion denied, 7/18/84.

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The Hearing Officer's reports were issued on the same day, January 19, 1985, and the judgments of the Indiana Supreme Court were rendered on January 13, 1987. Thus the Briggs family had been held to answer to disciplinary proceedings in one form or another from July 1977 through January 1987, almost ten (10) years. During this time the parties remained in practice with no other complaints or grievances being filed.

The Hearing Officer found that F.A. Briggs had a record of serving the legal profession well, that the charges against her grew out of an isolated incident and that no further significant risk of misconduct existed. He recommended a public reprimand for her and a six (6) months suspension for her husband. Without increasing the Hearing Officer's findings of misconduct against her, the Indiana Supreme Court, without stated reasons, summarily increased her punishment to not less than one year suspension. W.J. Briggs was suspended for two years -- both beginning on February 16, 1987. The joint suspension harshly and effectively closed the door on almost 29 years of law practice and left the Briggs family without means of support or sustenance.

Other background is in the report of the Hearing Officer and judgment of the

court (App.C & B, infra). For clarity, additional facts are stated with discussion of the issues.

## REASONS FOR GRANTING THE WRIT

**I. WHETHER IT IS IMPROPER, UNDER THE APPLICABLE RULES OF CRIMINAL PROCEDURE AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, TO REQUIRE TWO ATTORNEYS, CHARGED WITH DIFFERENT DISCIPLINARY VIOLATIONS INVOLVING DIFFERENT ISSUES AND PROBLEMS TO BE TRIED JOINTLY IN A SINGLE TRIAL WHEN PREJUDICE WILL RESULT TO ONE ATTORNEY'S DEFENSE THEREFROM.**

**A. Summary of the Issue.**

This issue briefly touches the question of which rules of procedure are applicable to attorneys in disciplinary proceedings and, hence, when joinder and severance of disciplinary actions is appropriate. At present, States appear unrestrained in their ability to force attorneys, charged with separate and distinct disciplinary violations, to try their cases together even though prejudice will result, simply because the attorneys are husband and wife in a single law

firm. Petitioner contends that she has been charged and brought to trial simply because she is the wife of an attorney which the State of Indiana sought to discipline. The State has treated her case as a "package deal" (App.C - 101, infra) with her husband and has afforded her no individual rights which she would have received had her last name not been that of her husband's. This issue appears to be one of first impression and tests what rules constrain a State when prosecuting an individual as attorney-spouse rather than attorney-advocate. This Court should now grant Certiorari to define what rules govern disciplinary proceedings involving husband and wife so that others in petitioner's position will not be stripped of their individual rights when seeking to preserve their attorney status.

**B. Although Disciplinary Proceedings are Quasi-Criminal in Nature, Substantial Due Process Should Be Afforded During These Proceedings Because an Attorney May be Deprived of Her Very Livelihood**

Although disciplinary procedures are termed quasi-criminal, (In re Ruffalo, 340 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).) high stakes are involved and substantial criminal protections should be afforded.

Disciplinary proceedings threaten serious punishment - loss of professional reputation. This stigma can harm the lawyer in his community and client relations as well as adversely affect his ability to carry out his professional functions - particularly if his branch of law is trial practice. Erdmann v. Stevens, 458 F.2d 1205 (U.S.C.A 2d Cir. 1972).

(F.A. Briggs is a trial lawyer. (App.C - 24, infra)

Because disbarment means deprivation of livelihood (Steadman v. S.E.C., 603 F.2d 1126, 1138 (5th Cir. 1979) lawyers must be afforded substantial due process of law. (In re Ming, 469 F.2d 1352 (7th Cir. 1972).

The test that must be employed as to the constitutionality of disciplinary procedure must be a very severe one (In re Bithoney, 486 F.2d 319, 323 (1st Cir. 1973) and court should use the strictest possible due process standards for the procedures used to carry out necessary bar discipline, Id.; also, Law Students Civil Rts. Res. Coun., Inc. v. Wadmond 401 U.S. 154, 174, 91 S.Ct. 720 (1971).

**C. A State, by Forcing an Attorney to be Tried Jointly with Another Attorney Charged with Separate and More Numerous Disciplinary Violations, Unfairly Prejudices that Attorney's Defense and Violates the Due Process Clause of the 5th and 14th Amendments.**

When two attorney disciplinary cases are joined for trial so as to prejudice either or both attorneys, courts should be required to separate the cases for trial to promote the ends of justice. Although, at present, it is unclear which body of law controls disciplinary proceedings, whether viewed from the perspective of the applicable rules of criminal procedure or under the Due Process Clause, a severance is required to avoid prejudice and when the rights of one of the parties is diluted. Petitioner contends that by being forced by the State to try her disciplinary case in the same trial with her husband, her case was infused with the alleged impropriety of her husband's conduct which greatly prejudiced her ability to present her defense. Petitioner requests this Court to grant Certiorari in order to define disciplinary procedure and to restrain States from

disciplining multiple persons, as husband and wife, rather than as individual attorneys. The improper joinder of petitioner's case with that of her husband justifies a reversal of the Indiana Supreme Court's imposition of sanctions on her, or, in the alternative, a remand to the trial court for a proper hearing on only the issues that relate to her.

It is proper to grant separate trials when participation in a joint trial tends, either by choice or design, to obfuscate the issues existing and to dilute the procedural rights of the other respondent. Burkett v. Crulo Trucking Company, 355 N.E.2d 253, (Indiana 1976).

With respect to joint trials, it has been noted:

> At a joint trial, where one defendant is charged with offenses in which the other defendants did not participate, the detailed evidence introduced to establish guilt of the separate offenses may shift the

> focus of the trial to the crimes of the single defendant. In such cases, codefendants run a high risk of being found guilty merely by association. United States v. Satterfield, 548 F.2d 1341, 1346 (9th Cir. 1977). (emphasis added).

This Court has also noted that with respect to joint trials of multiple defendants, the "dangers of transference of guilt" are such that a court should use "every safeguard to individualize each defendant in his relation to the mass." Kotteakos v. United States, 328 U.S. 750, 744, 773, 66 S.Ct. 1239, 1252, 90 L.Ed. 1557 (1946). Transference of guilt is much more likely in a case where husband and wife are tried together. The potential and actual "transference of guilt" from petitioner's husband to petitioner in the joint trial at issue can be seen from an examination of the record. To facilitate ease of discussion as applicable law, petitioner has set

forth facts from the record at the end of this section.

From the perspective of criminal procedure, Rule 8(b) of the Federal Rules of Criminal Procedure allows multiple defendants to be joined in trial in certain specified situations.* Discussing this rule, the 9th Circuit has noted, "[c]harges against multiple defendants may not be joined [under Rule 8(b)] merely because they are similar in character." United States v. Rosell, 432 F.2d 879, 898 (9th Cir. 1970) (citations omitted). Rule 8(a) requires that the defendants have participated in the same act(s) or transaction(s) constituting the offense.

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* "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

The record demonstrates that it was not the same acts or transactions of Petitioner and her husband that led to their alleged respective disciplinary violations. F.A. Briggs' husband was charged with violating disciplinary rules by writing an improper will for his client, being a co-owner of a joint C.D. and harassing his client. F.A. Briggs was not involved in this alleged conduct at all. F.A. Briggs was charged with five (5) violations and W.J. Briggs was charged with eight (8). Three (3) were the same and therefore five (5) charges against W.J. Briggs were not charged against F.A. Briggs. Although F.A. Briggs and her husband were both charged with delay in the termination of a guardianship, it was her husband, not F.A. Briggs, who was guardian for the client. (App.C- 7, infra). This charge was totally based on the State's co-mingling of issues which is

demonstrated by the state charging Petitioner as "wife", "spouse" and "law partner." (App.I, infra)

Because a large bulk of husband's case involved transactions in which she had no involvment, the State erroneously joined these cases causing extreme prejudice to Petitioner's case.

Even if it is determined that Petitioner's case and her husband's case were properly joined initially, the prejudice which became apparent to the court required that the court grant a severance of trial to the Petitioner. By rejecting separate trials the State allowed her husband's alleged improper conduct to "rub off" on Petitioner to her detriment, and ultimately, improperly resulted in her being sanctioned for conduct that was not her own. The ethical violations, if any, of husband became cloaked around the shoulders of wife like



the Biblical "sins of the fathers." These actions by the State violated the Rules of Criminal Procedure and Petitioner's due process rights, and justify a reversal of the Indiana Supreme Court's decision to impose sanctions on Petitioner.

Rule 14 of the Federal Rules of Criminal Procedure states that "[i]f it appears that a defendant is prejudiced by a joinder...of defendants...for trial together, the court may order...separate trials of courts, grant a severance of defendants or provide whatever other relief justice requires." Rule 14, Fed.R.Crim.Proc. (emphasis added). While the record amply supports the court's recognition of potential prejudice by joining Petitioner's case with her husband's case, numerous attempts by Petitioner to seek a separate trial were rejected and the court afforded Petitioner no relief at all.

Petitioner concedes that a motion to sever is addressed to the discretion of the trial court, Opper v. United States, 348 U.S. 84, 95, 75 S.Ct. 158, 99 L.Ed. 101 (1954), however, this Court has recognized that when joining cases for trial, "the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant." Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 468, 86 L.Ed. 680 (1942). "Every safeguard to individualize each defendant in his relation to the mass" should be employed since "the danger , persists that the guilt will improperly 'rub off' on the others." United States v. Mardian, 546 F.2d 973, 977 (D.C. Cir. 1976).

It has been noted that "severance is among the most important safeguards available to minimize the risk of

prejudice." Id. (citing United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), cert denied, 384 U.S. 947 (1966).). The District of Columbia Circuit accepts the rule that severance is required when evidence against one or more defendants is "far more damaging" than the evidence against the moving party. See Mardian, 546 F.2d at 977.

The evidence against her husband on execution of the will, the joint C.D., the harassment was "far more damaging" than the evidence against Petitioner. That prejudice to Petitioner existed can be seen in the Hearing Officer's own statements:

> In all candor it is impossible to always provide the source of much of the background information....(App.C - 94, infra)

The Hearing Officer at the outset of the joint trial recognized the "possibility of conflict" (App.C - 84,

infra) between the cases of the two parties. This, itself, decreed separation of causes.

Further, "[i]t is well settled that the trial judge is under 'a continuing duty at all stages of the trial to grant a severance if prejudice' to a particular defendant is made manifest." Kelly, 349 F.2d at 759 (citing Schaffer v. United States, 362 U.S. 511, 516, 80 S.Ct. 945, 948, 4 L.Ed.2d 921 (1960) (emphasis added).). A strong example of the prejudice to Petitioner is the fact that during one stage in the trial Petitioner wished to call a witness to refute the State's accusation against her but was forced not to because her husband (co-defendant) felt such testimony would be damaging to his case.

> Respondent and Co-Respondent indicated at two or three different stages of trial that they had held spirited discussions as to their

> appropriate course of action and that they were not in agreement as to what it should be. The only specific evidence on the topic was that one of them wanted to call two witnesses, the other didn't.... (App.C - 87, infra)

Because the cases were joined, Petitioner was placed in a position of having to choose between her own best interest (calling the witness) and the best interest of her family members (not calling the witness). Petitioner was charged with delay in a matter, and the witness was a judge who had previously stated that he, not Petitioner, was responsible for this delay. The statement was transcribed by the Court Reporter, certified and offered into evidence (Trial Exhibit A-31, App.K, infra) by F.A. Briggs in an effort to resuscitate her defense. Because the statement was hearsay the Petitioner was unable to present this evidence to the court without the witness

taking the stand. The harm is that F.A. Briggs was found guilty of the very delay the court took upon himself. Joinder of trials precluded Petitioner from presenting this testimony and she was convicted of this "delay" charge. Since the hearing officer had notice of this prejudice he had the duty at this stage of the trial to grant a severance. Kelly; Id. This prejudice supports reversal of the Indiana Supreme Court judgment against her.

In order to understand other prejudice which had to be endured by husband and wife being tried together, some background facts are necessary.

(a) The Judge on the February - May 1977 case Robert Munro, rendered an opinion with reference to W.J. Briggs which is quoted in the disciplinary proceedings of F.A. Briggs. (App.C - 33, infra):

> This Officer would be hard pressed to improve upon the observation of Judge Munro... In the matter at hand, (Mr. Briggs) treated the entire matter as an adversary proceeding,...

Note that while this finding relates to Mr. Briggs it is used as a basis to find against Mrs. Briggs the co-respondent. Therefore, the judgment is that F.A. Briggs committed an ethical breach as an attorney because of the ruling against her husband-client.

(b) Other examples of co-mingling of the two cases are found in the Hearing Officer's Report on F.A. Briggs as follows: Paragraph 2 refers to W.J. Briggs as a companion case and for roughly eight pages the Hearing Officer discusses matters pertaining almost entirely to W.J. Briggs. In paragraph 10 he even acknowledges that the incidents uniformly involved W.J. Briggs only. (App.C - 2, infra).

(c) Two paragraphs refer to other cases involving W.J. Briggs which do not concern disciplinary issues against F.A. Briggs. (App. C - 50, C - 82, infra).

(d) Paragraph 84 refers to the person as "her client" ('her' being F.A. Briggs) although she was W.J. Briggs' client. (App.C - 107, infra).

(e) Paragraph 11 refers to F.A. Briggs as respondent but clearly means W.J. Briggs. (App.C - 13, infra).

(f) Paragraph 62 states that the evidence undertaken by F.A. Briggs had little or no impact on her case. (App.C - 85, infra) This is a direct result of the joinder which left the parties, judge and counsel, confused as to what evidence had been put in for which respondent and the purposes for which exhibits were admitted.

An example that the parties were treated as one and not as individuals is that on one day of the trial, the Hearing

Officer held an in chambers conference with the Disciplinary attorney and her husband's attorney but did not include her in or notify her of the conference.

**II. WHETHER THE STATE VIOLATES DUE PROCESS AND EQUAL PROTECTION BY PROSECUTING A PERSON AS SPOUSE RATHER THAN ATTORNEY SUCH THAT THE TAINT AGAINST HUSBAND/ATTORNEY RUBS OF ON WIFE/ATTORNEY.**

**a. The State Prosecuted Respondent as a Spouse and Package Deal with Her Husband Rather Than as An Individual Attorney.**

It is believed that this is an issue of first impression since it relates to the treatment of an attorney as a spouse-advocate rather than an attorney-advocate. The spousal taint requires some background facts. F.A. Briggs is the attorney-spouse of W.J. Briggs, an attorney, who was drawn into litigation triggered by his client who filed a petition to remove him as her guardian and to appoint a successor guardian couched in language which the Hearing Officer

recognized as defamatory. (App.C - 109, infra). F.A. Briggs, looking at the Petition as an attorney was aware that some allegations were easily disprovable by court records and could have resulted in a finding of perjury and/or misleading of the court against the client's new attorneys. She consulted with Ralph Hanna, a senior and well-respected attorney, who recommended the proper course of action to be to demand strict proof of the allegations. She knew of the February 14, 1977, decision of the Indiana Court of Appeals in Wurm v. Haessly, 360 N.E.2d 12, (1977) that it is improper to terminate a guardianship if the ward is subject to undue inappropriate pressures. It is for her prudent legal advice, which happened to be given to her husband, that discipline has been imposed. Had she made these decisions for a client other than W.J. Briggs, it is submitted that no

discipline would have been imposed but it would have been regarded as advocacy on behalf of the client. The Indiana Supreme Court, determined that F.A. Briggs acted only to preserve her family's interest in the client's estate. Admittedly, the client had included members of Briggs' family in wills dated 1968 and 1970 (before the adoption of the Disciplinary Rules in Indiana) but on February 23, 1977, nine days after the commencement of the litigation, the will was changed, and from that time on, there was no family interest for F.A. Briggs to preserve.

There is a presumption in a disciplinary proceeding that the attorney is innocent of the charges, and performed her duty in accordance with her oath and acted from proper motives. 7A CJS Sec. 100, pp.49 & 50. These presumptions were not applied to F.A. Briggs for it was presumed that she could not be using good

legal judgment, but only that she was blinded by self-interest as a spouse.

While all lawyers are to be treated equally despite marital status, and it should not be presumed that just because lawyers are married they will violate disciplinary rules * this treatment was ignored in the F.A. Briggs case. It was presumed that she could not act independently as an attorney and apart from her husband. She was subordinated to her husband's case and denied equal protection.

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* Am. Bar Assn. Committee on Professional Ethics, Formal Opinion 340, 61 ABAJ 1542 (1975).

The Complaint (which is part of the record but is not in the appendix) against F.A. Briggs referred to her as a spouse, e.g., Paragraph 1, she "appeared and served as counsel for the conservator, her husband and law partner" and "her husband

and law partner was retained"; Paragraphs 16 and 20 she appeared and served as counsel for her husband and law partner; paragraph 27 refers to her conduct as law partner, spouse. Relevant portions are App.I, infra.

The report of the Hearing Officer excluding constitutional issues findings and recommendations is 54 paragraphs. Paragraph 1 is introductory; five do not refer to either F.A. Briggs or W.J. Briggs; twenty do not refer to F.A. Briggs at all but only to W.J. Briggs. Except for Paragraph 1, it is not until Paragraph 42 that F.A. Briggs is referred to individually as an entity separate from her spouse. Even the recommendations of the Hearing Officer at Paragraph 43 refer to "love and concern for her husband who was being defamed." (NOTE: Judgment for defamation was entered by another court.)

The fact that husband and wife were required to be tried together in a joint disciplinary proceeding even though many issues were different conveys that F.A. Briggs was being treated as Mrs. rather than as Attorney-Advocate. The equal protection component of the Due Process Clause gives the personal right to be free from gender-based discrimination even where it is not substantially related to achieving an important governmental objective. Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846.

The presumption of wrong-doing by advocate-wife offends the 1st, 5th and 14th Amendments to the U.S. Constitution. There was an oppobrium that attached to F.A. Briggs because she was classified "spouse" rather than "attorney-advocate" in this case.

**b. The Judgment, Co-Mingled the Spousal Cases.**

The Judgment of the Indiana Supreme Court consists of much background relating to W.J. Briggs, in areas not participated in by F.A. Briggs such as: drafting of will by W.J. Briggs; execution of the Certificate of Deposit; cash farm leases; lock-box incident; client going to another attorney. This set the stage for a finding against F.A. Briggs based on facts relative only to W.J. Briggs. Thus the evidence was polluted and co-mingled.

It is important to note that in the judgment F.A. Briggs is usually referred to as the "assistant" for W.J. Briggs. It is unknown, therefore, whether she is perceived of as an attorney or a spouse. If she is perceived to be acting only as a spouse, then any attempt to discipline her is improper and would be an interference with family integrity which is protected

by the 9th Amendment to the U.S. Constitution. Griswold v. Connecticut, 381 U.S. 749, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965). If she is perceived of as an attorney, then she was making judgment decisions with reference to her client and this is a protected activity under the 1st Amendment to the U.S. Constitution. Thornton v. Breland, 441 So.2d 1348 (Miss. 1983).

Evidence of co-mingling of the facts and issues is illustrated by the judgment that "they" (spouses) believed the guardianship should be terminated. (App.B - 26, infra) This is incorrect since the Hearing Officer's facts recognized that this was not the decision of F.A. Briggs, but of W.J. Briggs since she counseled against the filing of W.J. Briggs' Petition to Terminate. (App.C - 24, infra).

**III. WHETHER IT IS FUNDAMENTALLY UNFAIR TO HOLD DISCIPLINARY PROCEEDINGS OVER THE HEADS OF LAWYER-SPOUSES FOR ALMOST TEN YEARS BEFORE MAKING A JUDGMENT.**

**a. Bringing Stale Charges Denied F.A. Briggs a Fair Trial Because of Witness' Death.**

On July 19, 1983, F.A. Briggs was charged with delay of the termination of a guardianship. The Complaint was filed six years after the alleged offense and in this period the only witness who could have testified for her on this charge died. Because delay was not charged in the grievance F.A. Briggs had no notice that this witness' testimony would be needed to defend herself.

A chronology of relevant dates is as follows:

Dates of alleged delay, February-May 1977

Ralph Hanna (the witness) died, March 1981

Complaint filed, July 19, 1983

During the alleged delay period F.A. Briggs sought Ralph Hanna's (an attorney)

advice on how to proceed as to the guardianship at issue. He was acquainted with the client and familiar with the background of the case and advised F.A. Briggs that the attorneys for the ward should be forced to furnish strict proof of their allegations. There were no new facts from 1977 to 1983 to sustain the delay charge, thus, if the charge had been filed anytime before Mr. Hanna's death his deposition could have been taken to preserve his testimony.

Because the disciplinary charges were stale and brought so many years after the alleged offense, she was deprived of the only person who could have disproved that her actions were not taken with her family's interest in mind but were based on sound legal judgment after consultation with independent counsel.

The Hearing Officer found (Para. 61 (h) p. 32) that "Respondent was put on

notice early that this action would result so she had ample opportunity to recall and preserve as much as necessary." This is an erroneous conclusion since F.A. Briggs was not charged until after the death of Mr. Hanna, and then it was not possible to preserve his testimony. Stale prosecutions are not favored and are inequitable. Re Ratner, 399 P.2d 856 (Kansas 1965); Caldwell v. State of California, 531 P.2d 785 (Ca. 1975). The court found against F.A. Briggs on the very charge (delay) she was unable to disprove due to the court's own lack of diligence in prosecuting the charge in a timely fashion. This cause should be reversed.

**b. Lapse of Time in the Filing of the Charges Until the Death of Witness Denied F.A. Briggs a Fair Trial.**

Other litigation, a will contest, ensued in 1980 and again F.A. Briggs represented the several will-contestors,

one of which was W.J. Briggs. On November 8, 1980, an offer to settle the entire matter for all contestors was conveyed by letter to the attorneys for the residuary devisees, a church and a cemetary. The offer was never conveyed to the residuary devisees.*

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* The offer was for $29,250.00; fees for the attorneys in the will contest were $65,310.00 thus offering a possible explanation for the estate attorneys' unwillingness to convey the settlement offer.

The trial judge told her that she could explore conveyance of the offer with persons not on decision making boards. Since retired Reverend Arthur Schenck had been in her office recently, she asked him if he were on such board, he said "no" and she asked him to find out if the offer had been conveyed. At the disciplinary hearing, for the first time, she learned that all retired ministers are ex officio members of such boards even though they do

not participate. Since the grievance filed against her in June of 1981 alleged that she had communicated with or caused a person to communicate with the client of another attorney, her then attorney, James Stewart of Indianapolis, made a 130-mile trip to talk with Schenck - in October 1981. Scheck confirmed to Stewart that F.A. Briggs had asked him only to see if the offer had been conveyed. It was not necessary for Schenck to convey the offer...that had already been conveyed to the opposing counsel.

Passage of time and illness took their toll on Stewart. Stewart died in June of 1983. Schenck later contradicted the testimony of F.A. Briggs and W.J. Briggs and the statements he had made to Stewart.

Dates are important. The Briggs meeting with Schenck was November 1980; the meeting between Schenck and Stewart

was October 1981; the Commission authorized the filing of the complaint on this Schenck issue in September 1982; Stewart died in June 1983; the Complaint was filed in July 1983; the hearing was July 1984. Thus, by the time of the filing of the Complaint, Stewart, the only person who could have refuted Schenck's testimony was dead. The Commission had been put on notice by Stewart's reply to the grievances that he had met with Schenck who had confirmed to him that he was only asked to see if the offer had been conveyed. Nevertheless, the Commission chose not to file the Complaint against F.A. Briggs until a month after Stewart's death and over 10 months after it had been authorized. The lapse of time indulged in by the Disciplinary Commission in the filing of the charges cost F.A. Briggs her only rebuttal witness. The harm is that the Indiana Supreme Court

found against F.A. Briggs on this charge.

Certiorari should be granted to determine whether the Disciplinary Commission's deliberate indifference to the rights of the Respondent by bringing charges against her after the death of a witness whom they knew could testify in her behalf violated due process guaranteed by the 14th Amendment to the U.S. Constitution.

**IV. WHETHER INDIANA DISCIPLINARY PROCEDURES EMPLOYED IN THIS AND OTHER CASES ARE SO FUNDAMENTALLY UNFAIR AS TO VIOLATE DUE PROCESS.**

**a. The Constitution and Anglo-American Notions of Fair Play and Substantial Justice Demand Due Process.**

Some due process violations do not, in and of themselves, rise to the level of seriousness to mandate dismissal or remand of this case. However, cumulatively, they evince an attitude of deliberate indifference on the part of the State toward attorneys' due process rights.

This treatment relegates the attorney to a second class citizen and creates two classes of individuals....non-lawyers who are secure that they are entitled to due process and lawyers who are given only a watered-down version of constitutional-due process rights.

Due process of law is demanded by the 5th and 14th Amendments to the U.S. Constitution and also by traditional Anglo-American notions of fair play and substantial justice. Netterville v. Mississippi State Bar, 397 So.2d 878 (1981) cited in A Mississippi Attorney v. the Mississippi State Bar, Superior court of Mississippi, Misc. #169. A lawyer is trained from her first day in law school to look to the procedure to defend clients, to demand that procedure be followed not to offend due process. It violates fair play to tell the lawyer that because she is an attorney she can be

denied procedural due process by the Disciplinary Commission who has no fear of reprisal for this denial.

**b. The Disciplinary Procedure is Incestuous.**

In Indiana, since there is no State machinery to appeal a disciplinary decision, the judgment of Court is usually final. (This attorney has found no disciplinary case in Indiana which has been granted certiorari by the U.S. Supreme Court). The Supreme Court of Indiana is the court of last resort in that State. This very Court appoints the Disciplinary Commission, approves the choice of Executive Secretary, appoints the Hearing Officer and makes the final determination of bar discipline. (App.A, infra). This is an incestuous relationship. It is unlikely that an attorney requesting sanctions for due process violations by the Commission, or

its Executive Secretary will be successful; it would be tantamount to the Court cutting off its own arm. In determining that due process in Indiana includes only notice of the charges and the right to be heard, the Indiana Court has given carte blanche to the Commission to run unchecked over the due process rights of the individual attorney.

**c. The Disciplinary Commission Failed to Follow its Own Rules.**

F.A. Briggs was found to have violated Disciplinary Rules by delaying the termination of a guardianship from February - May, 1977. This is the harm. Her first notice of this charge was by way of the Complaint filed against her on July 19, 1983 since the grievance which preceded this Complaint did not charge this violation. Under A.D. 23 Sec. 10, (App.A, infra) if a new grievance comes to the attention of the Commission, the

attorney shall be given notice and 20 days to reply before a Complaint is filed. This rule was violated when F.A. Briggs was never given such a notice.

Because of this failure, F.A. Briggs filed a Motion to Dismiss this charge (App.H, infra) but the Motion was denied. The Executive Secretary of the Commission testified at the hearing that due process does not extend to the initial stages of the proceeding. His conclusion conflicts with Willner v. Committee on Character and Fitness, 373 U.S. 98, 83 S.Ct. 1175 (1963) holding that requirements of fairness are not exhausted in taking or consideration of the evidence but they extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

Blake v. N. Shore Multiple Listing Service, Inc., 367 NYS2d 440, 447, 81 Misc.2d 793, states that due process

includes procedural due process, i.e. ways of asserting and conducting disciplinary proceedings fairly and openly with full legal rights and remedies to be used by the party under attack. In the Matter of Edward L. Fleischer et al., N.J. Superior court, September Term 1985, #D 11/12/13 a dissent by Justice O'Hern recognizes that lawyers are entitled to no less fundamental procedural fairness than others facing disciplinary action.

Addressing a similar issue, In the Matter of Abrams, 521 F.2d 1094, 1104 states:

> If the district court chose as was its right...to go beyond the State court proceedings and examine other aspects of Abrams' 'conduct...' it was obliged to follow its own rules. (emphasis added).

Certiorari should be granted to determine if State Disciplinary Commission which fails to follow its own rules during disciplinary proceedings offends the due

process clause. The finding against F.A. Briggs on this issue should be reversed.

**d. The Executive Secretary Did Not Notify The Attorney of Permission to Appear Before the Disciplinary Commission.**

Although an appearance before the Disciplinary Commission in defense of one's self is not mandated by due process, once permission to appear has been granted, fair play and due process demand that notice be given to the attorney.

F.A. Briggs requested and received permission to appear before the Disciplinary Commission prior to the filing of any Complaint. (App.C - 75, infra). The Executive Secretary did not notify F.A. Briggs of the permission to appear. The first notice the attorney had that she could so appear was at the trial, 25 months after permission to appear had been granted.

At trial the Executive Secretary testified that he had not given the

attorney notice to appear. On July 9, 1982, the Commission held its July meeting and when the uninformed F.A. Briggs did not appear they withdrew their previously given permission. (App.C,infra). It is reasonable to infer that the Commission members thought that she no longer wished to appear. The minutes do not reflect that the Commission members were told that the Executive Secretary had failed to notify F.A. Briggs to appear. At any rate, after the July meeting, the Executive Secretary did take action by way of a letter to F.A. Briggs notifying her that her request to appear at the Commission had been denied. Fair play and due process were violated by these actions.

The harm is that F.A. Briggs lost her chance to personally address the Commission members, to answer questions and most importantly to have with her

attorney Stewart, who could have verified what F.A. Briggs had, in fact, told Schenck. (Discussion supra)

**e. F.A. Briggs Was Denied the Right to See Her Own File.**

In May 1985, F.A. Briggs went to the Clerk of the Indiana Supreme Court and asked to examine her own file. She wished to verify the filing of a Petition, copy of which had not been sent to her. She was not permitted to see her own file. A written petition to see and examine same shortly thereafter was denied. In denying this right, the court did not find that there was a state interest in denial. Since the files are public record, this is another denial to the attorney of due process rights. There could have been no harm to permit the attorney to see her own file.

**f. Executive Secretary Was Not Required To Produce His Report.**

A request to examine the report of

the Executive Secretary to the Commission was denied by the Hearing Officer (App.C - 97, infra). In making this ruling the Hearing Officer contravened the rulings of at least two states. Florida Bar v. Wagner, 175 So.2d 33 (Fla. 1965) and McGregor v. State, 483 S.W.2d 559 (Tex. 1972) hold that an attorney was entitled to the report after the filing of the complaint. Because of the method in Indiana of reporting only cases where misconduct is found, it is unknown whether any Respondent in Indiana has seen a copy of his/her report and whether permission for such examination has ever been granted in Indiana. The Hearing Officer stated in the W.J. Briggs findings:

> "In the long term, this may create an imbalance, inviting federal interference on due process grounds."
> (Para. 94, Hearing Officer's Report, attached to W.J. Briggs' Petition for Certiorari)

Certiorari should be granted so that

discovery guidelines in disciplinary proceedings will be uniform through-out the states.

g. Subpoenas of Witness Were Quashed.

The accused attorney deemed it necessary to her defense to have members of the Disciplinary Commission testify at her hearing to determine if the Commission really found reasonable cause against her to file the charges, if a fair presentation had been made to the Commission or if they acted as a "rubber stamp" which would tend to violate exception #2 of U.S. v. Leon, 104 S.Ct. 3405, 3422, 82 L.Ed.2d 677, 699 (1984). The subpoenas were quashed and, therefore, the attorney was denied the opportunity to present additional constitutional issues in defense of this case.

h. Due Process Violations Can Be Individual or Cumulative.

All of the due process violations

listed above cumulatively rise to constitutional dimension and dictate that this cause should be dismissed or remanded for an action consistent with due process.

Certiorari should be granted so that a guideline can be established for all lawyers subject to bar discipline and for the bar disciplinary bodies of the respective states.

**V. WHETHER A WIFE-ATTORNEY'S RIGHT AND RESPONSIBILITY OF ZEALOUS ADVOCACY OF HER HUSBAND-CLIENT IS PROTECTED SPEECH UNDER U.S.C.A. CONSTITUTIONAL AMENDMENT 1.**

Advocacy is a right guaranteed by the 1st Amendment and cannot be washed away simply because one is a spouse-attorney.

> "The lawyer's right and responsibility of zealous advocacy, <u>regardless of the name of the client</u>, is protected speech under USCA Constitutional Amendments 1 and 14. The lawyer is prepared to stand against the forces of hell though others see that as his client's just dessert. Advocacy on behalf of the client is among the most precious forms of speech."

Thornton v. Breland, 441 So.2d 1348 (Miss. 1983). (emphasis added).

The 1st Amendment embraces freedom to believe and freedom to act. Cantwell v. Connecticut, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). These are two freedoms that an attorney must have-regardless of the name of the client. The attorney must believe in her client and her client's cause. Then she must be free to act for the client. Disciplining an attorney for exercising these rights chills the protections afforded to both attorney and client. These rights cannot be punished simply because of the marital relationship between attorney and client. The 1st Amendment also guarantees freedom of mind. Baird v. State Bar of Arizona, 91 S.Ct. 702 (1971). Thus the attorney must know she is free in mind to make judgment decisions for her client and know that she

will not be disciplined for these actions.

Certiorari should be granted to determine if an attorney can be disciplined for advocacy of a client - whether the client is her husband or someone of another name.

Because the disciplining of the attorney for advocacy violates the 1st Amendment protections, the decision should be reversed.

**VI. WHETHER A DECISION BY THE STATE TO ASSESS COSTS AGAINST DISCIPLINED ATTORNEYS IS CONSISTENT WITH DUE PROCESS WHEN THE STATE PROSECUTES THE ACTION AND IS A BENEFICIARY OF THE PROCEEDS OBTAINED THEREFROM.**

In Indiana, the Disciplinary Commission and staff are arms of the Indiana Supreme Court and also act as the prosecuting power. The Indiana Supreme Court also assesses guilt and punishment in a disciplinary proceeding without any State machinery for appeal. (App.A, infra; App.F - 33, infra).

If guilt is assessed, not only must the Respondent pay court costs but also the expenses of investigation, witnesses and attorneys employed by the Commission. There is a lack of an independent adjudication when guilt fills the coffers of the court's arm. Therefore, the court, consciously or unconsciously, may use this as a factor in assessing guilt. At least it may tip the scales. The Disciplinary Commission and Court are all members of the same family and assessment of guilt by one member generates funds for another member. A not guilty would deplete family funds. Appellant here is referring to meals, hotels, airplane tickets, etc. The attempts of Appellant to determine the costs in advance and ascertainable standards for same were unsuccessful. This whole procedure can lead to abuses.

The plaintiff in a civil suit pays costs based on ascertainable standards

consistent with plaintiffs all over the State of Indiana. The costs assessed in a criminal proceeding are ascertainable, based on rules and statutes. However, the costs of Indiana Disciplinary Proceedings escape any standard of ascertainability and are left to the potentially abusive discretion of Commission members and employees.

The expenses in Disciplinary proceedings are carte blanche and with no governor known to Respondent. Thus, while Respondent may be eating a Big Mac at $1.25, she may be paying for a $10.00 hamburger the Disciplinary Commission Prosecutor is eating across the street.

It does not appear to comport with due process and fundamental fairness for the losing lawyer to have to pay for his own prosecution. This may chill right resulting in some lawyers to plead guilty

merely because of financial considerations.

This situation seems analagous to Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 34 L.Ed.2d 267, 93 S.Ct. 80 (1972). Where the court held that a mayor before whom petitioner was compelled to stand trial was also responsible for village finances, and assessed court costs which provided a substantial portion of the village funds, denied trial before an impartial and disinterested judicial officer as guaranteed by the Due Process Clause.

The test reaffirmed in Ward, Id., 83 is whether the situation would offer a temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused. Where one position is partisan

and the other judicial this necessarily involves lack of due process. Ward, 83.

In Gibson v. Berryhill, 411 U.S. 564, 366 L.Ed.2d 488, 93 S.Ct. 1689 (1973) the court found that personal interest of the licensing board disqualified the members from judging on license revocation of another optometrist. It is in no way contended, as in Berryhill, that the Indiana Supreme Court members have a personal pecuniary interest in bar disciplinary proceedings. However, the principle reaffirmed in Berryhill is applicable.

> "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate those disputes (citations omitted) ...the financial stake need not be...direct or positive...it has also come to be the prevailing view that '[m]ost of the law concerning disqualification because of interest applies with equal force to...administrative adjudicators." Berryhill at 500.

In a recent case, a Mississippi attorney sought to recover from the Disciplinary Commission his expenses in defense of his case after a finding of no misconduct. The court denied recovery because if it were granted the court assessing discipline might be inclined to find guilt just so expenses would not have to be paid to the winning attorney. the citation to this case is not available but can be furnished at a later time. The same principle would seen to apply to the assessment of prosecutorial expenses on a finding of misconduct as a means of filiing a coffer depleted by the investigation and prosecution. At least there should be ascertainable standards to put the attorney on notice of what expenses he might have to pay.

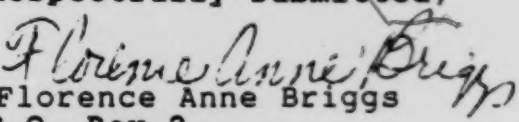
Certiorari should be granted to determine if it violates power in disciplinary cases to assess prosecutorial

expenses for a member of its own family. The judgement of the Indiana Supreme Court should be reversed where it assesses prosecutorial expenses to the respondent.

CONCLUSION

WHEREFORE, Florence Anne Briggs petitions the Court to grant certiorari, reverse the judgment of the Supreme Court of Indiana and for all other relief proper in the premises.

Respectfully Submitted,



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86 1976

Supreme Court, U.S.
FILED
JUN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

IN THE MATTER OF
WILLIAM J. BRIGGS, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF INDIANA

# APPENDIX

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EDITOR'S NOTE

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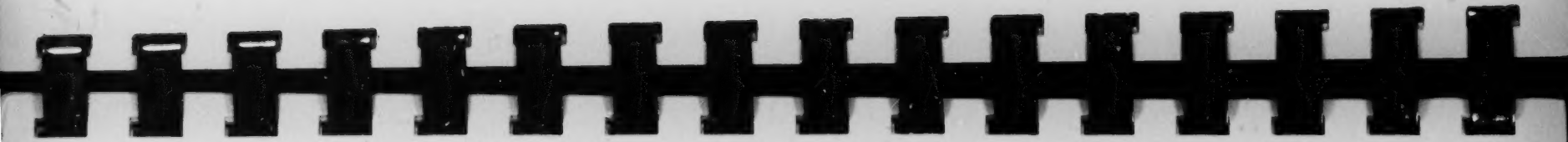
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# APPENDIX

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Amendments to the United States Constitution provide:

1st Amendment

> "RELIGIOUS AND POLITICAL FREEDOM.---Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

5th Amendment

> "Criminal actions---Provisions concerning---Due process of law and just compensation clauses.---No person shall be helf to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

6th Amendment

"RIGHTS OF THE ACCUSED.---In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

8th Amendment

BAIL -- PUNISHMENT --Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

14th Amendment

Citizenship---Due process of law---Equal protection.---All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Constitution

Article 7 Sec. 4

> Jurisdiction of Supreme Court.---The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction. The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death, life imprisonment or imprisonment for a term greater than ten years shall be taken directly to the Supreme Court. The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed.

Indiana Rules for Admission and Discipline (provide in part):

Ind. R.A.D. 23, Sec. 13

> In addition to the powers and duties set forth in the rule, hearing officers shall have the power and duty to:
> (a) Conduct a hearing on a complaint of misconduct within sixty (60) days after the hearing officer is appointed and has qualified;
> (b) Administer oaths to witnesses

(c) Receive evidence and make written findings of fact and recommendations to the court; and
(d) Do all things necessary and proper to carry out their responsibilities under this rule.

Ind. R.A.D. 23, Sec. 14(a)

(a) The rules of pleading and practice in civil cases shall not apply. No motion to dismiss or dilatory motions shall be entertained. The case shall be heard on the complaint and an answer which may be filed by the respondent within thirty (30) days after notice of the filing of the complaint. (balance of (a) omitted).

Ind. R.A.D. 23, Sec. 14 (e) (f)

(e) The proceedings may be summary in form and shall be without the intervention of a jury and shall be reported.
(f) Within thirty (30) days after the conclusion of the hearing, the hearing officers shall determine whether misconduct has been proven by a preponderance of the evidence and shall submit to the Supreme Court written findings of fact. Recommendations concerning the disposition of the case may be made by the hearing officer in discretion. A copy of said findings and any recommendations shall be served by the hearing officer on the respondent and the executive secretary of the disciplinary commission at the time of filing same with the Supreme Court.

Ind. R.A.D. 23, Sec. 15 (a) (b)

(a) The respondent or Commission shall have thirty (30) days after the filing of the hearing officer's finding and recommendation to petition for a review of the same before the Supreme Court. If no petition for review is filed within thirty (30) days of the finding and recommendation of the hearing officer of the Supreme Court shall enter judgment or such other appropriate order in the premises.
(b) Upon receipt of written recommendation for suspension, pending final determination of the cause, this court may forthwith enter an order of suspension thereon. Respondent shall have fifteen (15) days thereafter to petition this court for a review and a dissolution of such order.

## Canons of Professional Ethics of the American Bar Association

### Canon 6 Adverse Influences and Conflicting Interests

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interestrs, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

### Canon 37 Confidence of a Client

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees, and neither of them should accept employment which involves or may involved the disclosure or use of these confidences, either for the private advantages of the lawyer or his employees, or to the

disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

Filed 1/13/87

IN THE

SUPREME COURT OF INDIANA

IN THE MATTER OF

WILLIAM BRIGGS

Cause No. 1078 S 235

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DISCIPLINARY ACTION

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Per Curiam

This Disciplinary cause is before us on a verified amended complaint charging the Respondent with misconduct arising out of his association with an elderly client. This is a companion case to In re Florence Ann Briggs which involves Respondent's spouse and law associate. After a joint hearing, the Hearing Officer has submitted two separate, excellently presented, reports in each case. Both Respondent and the Commission have petitioned for review of the ultimate findings of fact and conclusions of

law in this case, but the underlying findings of fact as submitted by the Hearing Officer remain, for the most part, unchallenged.

We have reviewed the Hearing Officer's report and all other matters submitted in this cause and now find that the Respondent is a member of the Bar of this state and is, thereby, subject to this Court's jurisdiction. He maintains an office for the practice of law in Carroll County with his spouse, Florence Anne Briggs. Though never under a formal agreement, the Respondent and his spouse held themselves out to the public as a law partnership operating as Briggs and Briggs.

During the mid 1960's, the Respondent began representing Kate Smoker in a variety of legal matters. Kate Smoker was an elderly childless widow with an estate consisting approximately of a 292 acre farm and $150,000 cash. With the

exception of a few small fees, the Respondent did not charge her for his services, and she did not pay him. The two had discussed some sort of a lifetime fee arrangement whereby the Respondent would perform legal services until her death for the sum of $10,000. In 1967 she first mentioned that she wanted the lifetime payment arrangement with the Respondent and, by 1970, there was an understanding that the Respondent would receive $10,000 out of Mrs. Smoker's estate.

The Respondent prepared several wills for Kate Smoker while he represented her. The first will was drafted in 1967 while she was hospitalized; therein the Respondent was left a legacy of $1,000. In 1968, he prepared another will and again the Respondent was to receive a legacy of $1,000. The Respondent was named coexecutor and both he and Florence Anne Briggs were named to serve as attorneys for the estate

and for an educational trust created under the residuary clause of the will. The trust was to provide college scholarship grants to residents of Burlington Township who maintain a C-plus average for their college years. This trust provision was part of the earlier wills, however, in this will, Mrs. Smoker directed that an additional clause be added naming Winston Briggs, Respondent's son, the first recipient of the trust. The trust was to accumulate income until Winston Briggs started college and was to be payable to him regardless of his residence or grade average through both undergraduate and professional or graduate school. A 1970 will drafted by the Respondent again retained the legacy to the Respondent and the trust provisions for Winston. Florence Anne Briggs was named co-executrix, and the trust was modified to provide for three years of accumulation after it was formed, except for payments to Winston, and a

special clause to reimburse him for the cost of tuition, books and living expense for his school years.

The creation of the trust was entirely Kate Smoker's idea, which she specifically affirmed by executing a holographic statement contemporaneously with the execution of the 1970 Will. Mrs. Smoiker's closest relative was an elderly first cousin; she had no other natural object of her bounty. However, at no time prior to the execution of Smoker's 1970 Will did the Respondent suggest to hér the possibility of conflict or that she should obtain independent legal advice as to her will.

In the fall of 1976 Mrs. Smoker's health began to fail and she was hospitalized. During this time she and Respondent discussed arrangements for paying the Respondent a $10,000. fee. Mrs. Smoker desired to bequeath this amount through her

will, and the Respondent advised her to consult another attorney. They also discussed the method which was eventually used, a certificate of deposit. On November 8, 1976, Mrs. Smoker called the Respondent to suggest three items of business she wanted to conduct: (a) modify her will with a codicil, (b) nominate the Respondent as her guardian should a guardianship become necessary, and (c) to finalize the$10,000 arrangement for a joint certificate of deposit. On November 9, 1976, Respondent went to Kate Smoker's home with his two secretaries. Present were Smoker's friend, John Johnson and a local banker, Earl Rodkey. Mrs. Smoker executed a $9,000 joint certificate issued to herself and the Respondent which, together with the $1,000 legacy, was to be compensation for past and future services. The Certificate was to be held by Johnson. On the same date Mrs. Smoker also nominated the Respondent as

her guardian, should one become necessary. That same afternoon Mrs. Smoker visited her doctor, Dr. Wagoner, who opined that, at such time, she was not competent to manage her affairs because of advanced senility.

Thereafter, Mrs. Smoker's health deteriorated rapidly and, on November 13, 1976, she was admitted to a hospital. It was clear that she could no longer manage her own affairs, and, on November 24, 1976, the Respondent was appointed temporary conservator by the Carroll Circuit Court. As such, the Respondent became involved in the Smoker farm operation and the renewal of tenant leases. Mrs. Smoker had normally operated her farms on a crop-sharing basis. The Respondent, however, in anticipation of the need for cash for Smoker's medical and nursing costs, changed the practice to cash rentals. On December 13, 1976, Mrs. Smoker was discharged again and her doctor advised the Respondent that her condition was

irreversible and that she would permanently require custodial care. Mrs. Smoker, however, made a remarkable recovery, and, after an examination on January 11, 1977, her doctor found her mental impairment to be minimal and her medical and mental problems to be in remission.

It was during this time that she became aware of the guardianship and questioned Mr. Rodkey as to the joint certificate of deposit, professing no recollection about making it. Notwithstanding the recovery, on January 13, 1977, the guardianship was made permanent. The doctor continued to opine that she was incompetent because her recovery was temporary.

During the next month the long-standing relationship between the Respondent and Smoker deteriorated. In late January or early February, 1977, Smoker went to Respondent's office to obtain her lock

box key. The respondent correctly refused to give it to her, but made a statement to the effect of "you don't like authority, do you." This greatly agitated Smoker who perceived this as a calculated act intended to degrade her. Sometime during this period the Respoondant offered to resign as guardian, but Smoker was reluctant to have the bank assume that role and declined his offer.

Mrs. Smoker, with the assistance of a friend, Bobby Ritchey, contacted another attorney, Adrian Marks, to discuss the termination of her guardianship. As arranged by Marks, two physicians examined her; both believed her to be competent to manage her affairs, though one found her to be in the early stages of senility. After Mrs. Smoker informed the Respondent that she had contacted Adrian Marks, and after some unfriendly interchanges between the Respondent and Marks and the Respondent and

Bobby Ritchey, the Respondent, on February 12, submitted two petitions to Judge Jeffrey R. Smith, Judge Pro Tem of the Carroll Circuit Court. The Respondent (1) requested that certain persons, particularly Bobby Ritchey, be restrained from interference with Respondent's relationship with his ward and (2) objected to the filing of any pleadings allegedly signed or authorized by the ward and (3) sought a protective order against his production of any documents.

On February 13, Kate Smoker directed Attorney Marks to proceed and, on February 14, he filed a Petition to Remove the Conservator and Appoint a Successor Conservator. A hearing on the petition was scheduled for February 18th. Sometime between February 14th and 19th, the Respondent had a telephone conversation with Kate Smoker during which he read to her a bizarre fish story. It was as follows:

"He would introduce his bills in committee and

the chairman would always thank him. They were always very courteous. They'd say something like "we'll be glad to give this bill due consideration" and of course, before the session was over, they'd have chopped everyone to ribbons and finally one day when someone told him that his bill would get due consideration, he let all of his frustrations out. He reared up, eyes flashing and stuck out his finger and said, "Yes, Mr. Chairman, I know the consideration you'll give this bill. It's the consideration of the fisherman for the shad, Mr. Chairman," he said. "When the fisherman catches the shad and brings it into the boat the poor fish flips and flops and tries to escape and the fisherman speaks so politely to the shad. He says, "Lie still, little shad, I am not going to hurt you. I am going to treat you well. I'm not going to do a thing more to you except cut your head off. And after that I'm not going to do a thing to you except cut

> all your bones out." And he pounded on the committee table and said, "That's the consideration I expect from you, Mr. Chairman, the shad treatment, Mr. Chairman . . . . the shad treatment and I may have to take it, but I will fry in hell before I say thank you."

Kate Smoker took the point of the story to be that, on her death, her estate will be carved up. This particular incident occurred during a time of great stress for Mrs. Smoker and was calculated to cause her further stress and discomfort.

After some deliberation, the Respondent himself filed a Petition to Terminate the Conservatorship. In the meantime, Mrs. Smoker had, on February 23, 1977, executed a new will drafted by Attorney Marks. It did not provide for an educational trust. She madea modest bequest of farm land to Bobby Ritchey and left residue equally divided between a trust for the

Burlington Methodist Church and the Burlington Cemetery.

After filing of the Petition to Discharge and Remove by Attorney Marks and the Petition to Terminate by Respondent, the Respondent began delaying and resisting action on these petitions. On February 23, Attorney Marks by letter, agreed to respondent's Petition to Terminate and suggested a form decree which would end the conservatorship as asked for by the Respondent. The Respondent failed to answer. Further discussion also resulted in Respondent refusing to agree to the grating of his own petition. Between March 9 and 15 three physicians filed their written reports with the Court in which each of them affirmed that Kate Smoker was of sound mind and capable to manage her own affairs. On April 12, failing to get an agreed entry from the Respondent on his own Petition to Terminate, her attorneys filed a reply which

admitted his allegations that the guardianship should be terminated. On April 19, Smoker's attorneys also filed a Motion for Summary Judgment contending that the pleadings showed that the parties and all of the physicians were in agreement as to Smoker's competence. The Court took judicial notice of the doctor's reports, finding that they need not be called as witness and limited the issues for hearing.

On May 11, the date of the scheduled hearing, the Respondent filed his "Objection to Court Order" objecting to the foregoing limitations and objecting to the doctor's reports. On the same day he also filed a response to the Motion for Summary Judgment objecting to the granting of his own Petition to Terminate without a hearing on Smoker's Petition to Remove because the latter petition, he claimed, "has cast doubt on the character of William Briggs by innuendo." The hearing was again continued,

this time to May 26, to allow Dr. Wagoner, who was then unavailable, to testify in person. During the time after the filing of the Petition to Remove and the ultimate return of her property, Kate Smoker was in a state of strain and emotional distress as a direct result of Respondent's continued control of her property and her inability to alter this.

On May 26, the Court entered its termination order. Immediately after, Smoker executed a codicil to her 1977 Will reaffirming its terms. The order of termination provided that Kate Smoker could take over her business affairs immediately, the Respondent was to file his final report within two weeks, $2,000 was to be transferred to Smoker for her immediate use, and that her will, tax papers, and all other papers be available to her at the time the final report was submitted. Even at this stage, there were causes of further friction. The $2,000 was made available

before June 15, but the Respondent gave it no priority; numerous business records, including checking account records were not timely delivered. The Respondent took no special steps to return the lock box key though it was delivered on August 2, 1977.

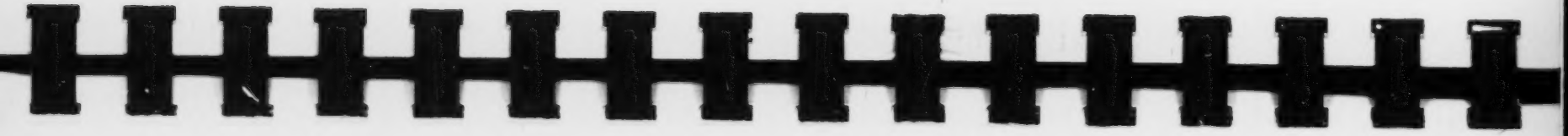
The Respondent objected to b eing required to file his claim as conservator and attorney claiming the lifetime fee contract with Smoker. Upon the overruling of his objections, he filed a claim for $1;7,585 for administering the guardianship from November 24, 1976 to May 25, 1977, a total of 6 months and 2 days. Though his prayers for relief were in the alternative, Respondent's ultimate goal was to assure the payment of the $10,000 lifetime contract. It was during these lengthy termination proceedings that the Respondent became aware that Smoker and her attorneys had filed a grievance with the Disciplinary Commission.

The matters scheduled for

conclusion as part of the guardianship's final report included (1) determination of Respondent's fee; (2) the Ward's objection to the final report; (3) Respondent's claim for damages because of defamation; and (4) claim for personal injuries and damages by the Ward against the Respondent.

Between 1977 and 1979, Smoker managed her own affairs but there was a gradual erosion of her alertness and increased symptoms of senile dementia. In anticipation of this deterioration, her evidentiary deposition was taken for this proceeding on November 22, 1977. She passed away on November 21, 1979, approximately two weeks prior to the commencement of the trial scheduled on the final report of her conservatorship.

On November 26, 1979, the Respondent filed sworn objections to the probate of "any will" Smoker may have executed after February 24, 1970.



Respondent's ultimate purpose in contesting the 1977 Will and codicil was to preserve his own claim and all of the benefits which the 1970 Will, as drafted by him, had contained. Smoker's competence at the time of the execution of the 1977 Will was not challenged; his claim was based on the issue of undue influence in the drafting of the 1977 Will on which the Respondent felt he could prevail.

Trial on the guardianship's final report and related matters was held over a period of thirty (30) trial days, between December 3, 1979, and August 7, 1980. Though Smoker's Petition to Discharge was not an issue because the guardianship had been terminated, substantially all allegations therein were litigated during this trial. The trial court approved the final report except for the guardian's fees and attorney fees, all of which were denied based upon apparent conflict of interest;

Respondent's claim to the $9,000 certificate of deposit was set aside and the underlying contract for lifetime legal services was rescinded upon a theory of undue influence; Smoker's administrator's claim against the Respondent for misfeasance in managing the estate was denied. Included in the latter argument was an attempt to recover for psychological abuse and emotional strain, but the court held that Smoker's death rendered any such issue moot. Respondent's claim for defamation allegedly caused by p leadings filed on July 14, 1977, was upheld, but he received nominal damages of $1.00. The trial court further concluded that no oral contract nor implied contract for legal services had existed prior to November 9, 1976, that the prior services were rendered gratuitously and that fees could not be recovered on a quasi-contractual basis. Except for reversal of a $25 fee awarded to the

PUBLISHER'S NOTE:

The following pages are unavailable for filming: B-20

Respondent wanted the settlement to be communicated to the Church Board; he could not present the offer himself because the attorney for the church had forbade such presentation. The Chairman of the Administrative Board of the Church rejected the idea of presenting the settlement.

An eleven day trial to a jury ensued and, after eight hours of deliberation, the j ury returned a verdict against the Respondent, effectively upholding the 1977 Will.

On review before us and at the hearing stage of this proceeding, the Respondent makes sweeping challenges to the entire proceeding, claiming numerous constitutional infirmaties and arguing for dismissal of this case. The framework of his petition for review is such that issues overlap, are difficult to discern, isolate or address in an orderly manner. The Hearing Officer has made extensive findings

and conclusions as to Respondent's constitutional challenges of colorable merit. At this juncture, we will address the general challenges directed to the entire proceeding; challenges to specific disciplinary rules and charges are resolved within this Court's determination of possible misconduct by reason of the above-noted findings.

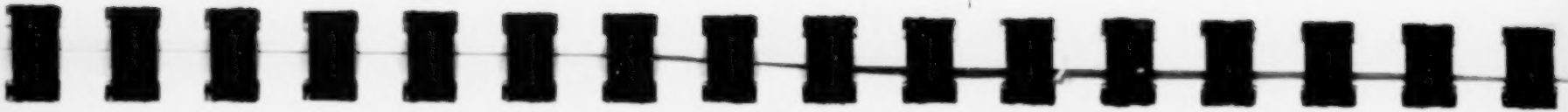
A primary issue raised by the Respondent is his contention that delay in bringing this matter to a hearing has served to deny him his constitutional right to a speedy trial and due process of law and has visited cruel and unusual punishment upon him.

On this issue of delay, the Hearing Officer found, and we agree, that the Disciplinary Commission received a complaint letter from attorney Marks in July, 1977; it was followed by a grievance submitted by Mrs. Smoker and her attorneys,



Marks and Powers. After determining that basis for further investigation existed, the Executive Secretary of the Commission set in motion further investigatory procedures which included notice to the Respondent and an invitation for any response the Respondent may deem appropriate. Again, in accordance with Admission and Discipline Rule 23, and standard procedures, the Commission, by a vote on July 14, 1978, decided to file a disciplinary action against the Respondent; the complaint was filed on October 24, 1978. On October 30, 1978, the Honorable Harold Staffeld was appointed as Hearing Officer.

Respondent was first represented by attorney Thomas Ives, then Attorney James Stewart of Indianapolis, un til Stewart's death in June, 1983. Stewart's partner, Gilliam, withdrew from the representation some months thereafter. After his appointment, the Hearing Officer did not



schedule the case because much o f his time was taken up by the so called "Pinto" case, though the Commission attorney, Hughes, wrote a letter requesting a pretrial conference. Informally, Attorney Stewart and Hughes, had agreed to await the result of the pending litigation before proceeding to trial in this cause. As noted earlier, the guardianship trial lasted until August 7, 1980, and final judgment was entered on November 5, 1980. Shortly thereafter, the will contest was commenced; judgment was entered on December 9, 1980. Subsequently, Hearing Officer Staffeld became seriously ill and died in the fall of 1981. In the interim, new grievances were filed against Respondent and his spoouse and law partner based upon their action in the guardianship and will contest trials. This Court appointed a second Hearing Officer and, upon Respondent's objections, removed him and appointed the present Hearing Officer who

qualified on February 24, 1982. Based on the new grievance, the Commission, on September 10, 1982, approved the filing of complaints against the Respondent and his wife. On July 19, 1983, the Commission filed an amended complaint against the Respondent and a Verified Complaint against Florence Ann Briggs. Any delay between approval of the latter complaints and their filing was incidental delay related to the workload and scheduling of the Commission's attorneys.

Respondent's claim to a Sixth Amendment Right to a speedy trial is not supported by authority. The Sixth Amendment of the Constitution of the United States speaks of rights in "criminal prosecutions"; this Court has held that a proceeding such as the one before us is not a criminal proceeding and the application of standards generally afforded a criminal defendant is not appropriate here. In re Roberts (1983),

Ind., 442 N.E. 2d 986. Similarly, the Respondent has failed to cite nor could we find any authority which could support his contention that Article 1, Section 12 of the Constitution of Indiana is applicable to these proceedings. Respondent's related claim that the passage of time constituted cruel and unusual punishment is likewise unsubstantiated and without merit.

The Respondent also claims that the delay has resulted in a violation of his right to due process as guaranteed by the Fifth and Fourteenth Amemndments to the Constitution of the United States and Article 1, Section 12 o f the Constitution of Indiana. In the past we have had several occasions to examine the applicability of civil and criminal due process requirements in the context of a disciplinary proceeding, and we have measured these standards within the unique character of these proceedings. In re Roberts, Supra. Due process, as

applied to disciplinary proceedings, requires notice of the charges and an opportunity to be heard. In re Ruffalo, 390 U. S. 544, 88 S. Ct. 1222, 20 L.Ed.2d 17, reh. den. 391 U.S. 961, 88 S.Ct. 1833, 30 L.Ed.2d 874; In re Roberts, Supra; In re Murray (1977), 266 Ind. 221, 362 N.E. 2d 128; In re Stivers (1973), 260 Ind. 120, 292 N.E.2d 804. Beyond these requirements, there may be factual situations in which the expiration of time destroys the fundamental fairness of the entire proceeding, thus, rising to the level of due process violation. In re Wireman, Supra. Both parties made reference to a four-factor speedy trial test set out in Barker v. Wingo (1972), 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101, and its Indiana progeny. In the context of the proceeding before us, the four factors, 1) length of delay; 2) reason for the delay; 3) assertion of a desire for a speedy trial, and 4) prejudice arising

from the delay, can provide guideposts for our deliberation; however the premise of our examination is not whether the Respondent was denied a speedy trial, but whether, in light of the totality of the circumstances, the proceeding afforded fundamental fairness.

We agree, as the Hearing Officer found, that the Respondent made no request for an expedited hearing and, in fact, through his counsel, agreed to postponement of this hearing pending the outcome of the termination of the guardianship matter and the will contest. We fully agree with the Hearing Officer's rejection of the contention that the incidental delay occasioned by the Commission's staff scheduling causes constitutional infirmity. Respondent's claims of prejudicial harm due to loss of witnesses, loss of evidence, loss of his trial attorney and the originally appointed Hearing Officer fail to persuade

us. As the Hearing Officer found, preservation of evidence in this case was far easier than might have been in many others. The Respondent was put on notice that this action would result and had more than ample opportunity to make arrangements to preserve whatever he deemed necessary. Respondent's claim of harm due to loss of his attorney and earlier Hearing Officer is without merit; as the Hearing Officer concluded, we agree that fundamental fairness is not indeibly attached to the participation of any one individual. In light of the findings and foregoing considerations, we conclude that in this case, the lapse of time between notice to the Respondent and the hearing does not constitute denial of due process.

The Respondent next contends that this Court, the Hearing Officer and the Disciplinary Commission have all lost jurisdiction of the case because 1) a

provision in Admission and Discipline Rule 23, Section 13, that a hearing take place within 60 days has not been followed; 2) the rule has been applied in an unconstitutional fashion; and 3) this postponement has caused the entire proceeding to be "in excess of jurisdiction". The cases referred to in support of his contention have no precedential value to proceedings involving discipline of attorneys. This Court derives its jurisdiction over discipline of disbarment of those admitted from Article 7, Section 4, Constitution of Indiana. This Court has previously held that there is no authority for the proposition that expiration of the 60 day period found in Admission and Discipline Rule 23, Section 13 establishes a constitutional infirmity. In re Wireman, Supra. We are further mindful of the fact that, through his counsel, the Respondent agreed to postponement of the hearing. In conclusion, we find this

argument withour merit.

Respondent contends that he was denied effective judicial review and right to seek redress of grievances, including redress of constitutional errors. This claim is premised on the contention that the Respondent was deprived of a fair and adequate opportunity to pre sent his constitutional claims because he did not receive a bifurcated hearing as requested. The Respondent has cited to no authority or argument which would tend to support his proposition; his reliance on the case of In re Sekerez (1984) 458 N.E.2d 229 is misguided. Additionally, it is clear from the record that the Hearing Officer expanded more than adequate effort on hearing and evaluating Respondent's allegations of constitutional infirmities. In conclusion, we find this argument to be insupportable.

Respondent claims that he was deprived of his constitutional right to have

compulsory attendance of witnesses because his subpoenas to Commission members were quashed and his questions propounded to the Commission Executive Secretary and Attorney were limited. We note that no record has been submitted as to the latter contention. This argument relates to Respondent's attempt to allege and prove that he was selectively prosecuted and thus, denied equal protection of the law. The Hearing Officer found and we agree, that Respondent's chief purpose was to inquire of the Commission members why they did not seek to prosecute the other attorneys involved in the protracted Smoker litigation. We agree with the Hearing Officer's finding that there was no showing that the members had firsthand knowledge of some fact in issue. Respondent's contention fails to convince us that the Hearing Officer's decision relative to these witnesses and the quashed subpoenas was erroneous or somehow constitutionally

improper.

The Respondent further claims denial of a fair hearing due to several alleged constitutional infirmaties caused by violations of specific provisions of Admission and Discipline Rule 23. Apparently during 1978, he was not advised, pursuant to Admission and Discipline Rule 23, Section 10(b), that the grievance filed against him had been docketed for investigation. We fail to see, nor has the Respondent been able to show us, why or how such omission could be a constitutional bar to these proceedings. He contends that the Commission failed to give him notice of investigation of charges beyond those contained in the grievance filed by the grievants. This Court has held that, so long as the grievance serves to inform the Respondent of the general nature of the charges against him, there is no denial of due process merely because the complaint filed by the Commission is not limited to

the charges specified in the grievance. Because grievances are drafted by those unskilled in the law, they will not be strictly construed. In re Wireman, Supra.

Thirdly, he contends that the Commission failed to find "probable cause." We note that Admission and Discipline Rule 23, Section 11(d) specifically provides for the finding of "reasonable cause." We, thus, conclude that the provisions of Admission and Discipline Rule 23 were not applied to the Respondent in an unconstitutional manner and did not result in an unfair proceeding.

The Respondent contends that his right to freedomo of speech was abridged when he was denied a request to appear before the Disciplinary Commission during the administrative stage of the proceeding and by Admission and Discipline Rule 23, Section 14, which proscribes dilatory motions and motion to dismiss. Again, the

Respondent has failed to refer us to authority which would tend to support his claim. We find these contentions without merit.

The remaining issues on review before us relate to the specific charges and will be resolved within that context.

By way of background, we find that the Verified Complaint filed against the Respondent in 1978 and the Amended Verified Complaint filed in 1983 charged that, by giving advise on and drafting the 1970 Will of Kate Smoker, the Respondent engaged in conflict of interest and failed to seek his client's objectives in violation of Discipline Rule 5-101(A) (1) and 7-101(A) (1) of the Code of Professional Responsibility for Attorneys at Law. The Respondent moved to dismiss these charges because they alleged misconduct occurring prior to the adoption of the Code. The Hearing Officer allowed the Commission's

attorney to amend the complaint and charge the same misconduct under the Canons of Professional E thics of the American Bar Association.

The Respondent challenges this amendment arguing that, 1) he is somehow being punished retroactively; 2) allowing such amendment was beyond the jurisdiction of both the Commission and the Hearing Officer; 3) the amendment was not authorized by the Commission; 4) the Respondent was not given the opportunity to respond to the Commission; and 5) the Canons under which he was charged are unconstitutionally vague and, therefore, void. Respondent's contentions are not convincing.

The Respondent was on notice in 1978 as to the conduct which was alleged to constitute misconduct. The Commission's initial determination that Respondent's alleged conduct is unethical was not altered by the subsequent amendment. This Court,

prior to the adoption of the present disciplinary rules, did impose di cipline, and thestandards for such conduct were the Code of Professional Ethics of the American Bar Association. In re Crumpacker (1978), 169 Ind. 630, 383 N.E.2d 36, cert. denied 100 S. Ct. 481, 444 U.S. 979, 62 L.Ed.2d 406; In re Kuzman (1975), ____Ind.____, 335 N.E.2d 210. The amendment to the Complaint more appropriately set out the standard by which the same conduct was measured prior to the adoption of the Code. Similarly, we are not persuaded by Respondent's unsubstantiated claim that the Canona he is alleged to have violated are void for vagueness.

In addition to the foregoing procedural and constitutional challenges, the Respondent contends that during 1968, when he drafted Mrs. Smoker's earlier will, he advised her to seek another attorney. Thus, he contends, he was relieved of any

obligation relative to the 1970 Will. We find that such advise was not pertinent to the 1970 Will, and was insufficient to fully appraise Smoker of the potential conflict, tax and other legal remifications embodied in the 1970 Will. The resulting scenario of events is a sad example of the sort of consequence intended to be proscribed by the Canons and, presently, by Disciplinary Rule 5-101 of the Code. We conclude that, by drafting the 1970 Will of Mrs. Smoker, and counseling her thereon, without fully disclosing the legal ramifications of the document and the potential conflict of interests, the Respondent violated Canons 6 and 11 of the Canons of Professional Ethics.

The Respondent is further charged with engaging in conflict of interest in violation of Disciplinary Rule 5-101 and 1-102(A) (4) and (6) of the Code of Professional Responsibility for Attorneys at Law, by advising and participating in the

execution of a joint certificate of deposit in his and his client's name.

We conclude from the foregoing findings that the Respondent engaged in the charged misconduct.

The Respondent is charged with harassing his client thereby engaging in illegal conduct involving moral turpitude, conduct involving fraud, deceit and misrepresentation, conduct that adversely reflects on his fitness to practice law, and conduct prejudicial to the administration of justice, in violation of Disciplinary Rule 1-102(A)(3), (4), (5) and (6). In light of the findings on this issue, we conclude that the Respondent's acts of harassment toward his client constitute misconduct, in violation of Disciplinary Rule 1-102(A)(5) and (6).

The Respondent is charged with violating Disciplinary Rules 5-101 and 1-102(A)(1), (5) and (6) of the Code by

unreasonably delaying the termination of his client's conservatorship and particularly delaying the restoration of control over her property. He contends that imposing discipline for his filing pleadings in response to Smoker's Petition to Discharge him as conservator constitutes denial of his constitutional right to seek redress of grievances and denial of his right to free speech guaranteed under the First Amendment of the Constitution of the United States and Article 1, Section 12 of the Constitution of Indiana.

The rights claimed by the Respondent are not absolute but are measured within the context of competing social values; each prohibition, circumscribed by the factual setting, is measured against the affected state interest and the imposed limitations. In re Friedland (1981), 275 Ind. 214, 415 N.E.2d 433. The Respondent had a professional duty to pursue and

protect his client's interests. Neither his personal interests or the interests of others should be permitted to dilute this duty. E.C. 5-1. The availability of independent and competent legal representation lies at the core of our system of justice. We must examine Respondent's actions and contentions in light of this weighty public interest. We find that he intentionally set out to frustrate and hinder his client in an effort to vindicate his reputation and exact retribution. The termination of a conservatorship, where three physicians unanimously agree as to the competence of the ward, normally would be a simple and routine matter. However, in this instance, the Respondent treated this proceeding as an adversary one and sought to vindicate his position and allay what he perceived were aspersions to his reputation, while being fully aware of the extreme emotional stress caused to Smoker, "for the

purposes ultimately designed for his own benefit, namely to protect his own reputation." Under these circumstances, we find that Respondent's acts were not protected and a finding of misconduct and imposition of sanction is not an unpermissable infringement on his right to free speech or his right to petition the government for redress. We conclude that the Respondent engaged in the misconduct as charged.

The Respondent was also charged with attempting to collect an illegal or clearly excessive fee, in violation of Disciplinary Rule 2-106(A) and (B). The Hearing Officer concluded and we agree, that the evidence was not sufficient to prove misconduct under this charge.

The Respondent is further charged with violating Disciplinary Rule 7-102(A)(1), (5) and (6) by contesting, in bad faith, a will which he had no probable cause to consider invalid. The Disciplinary

Commission has challenged the Hearing Officer's conclusion that there is insufficient evidence to prove that the Respondent filed the will contest in bad faith merely to harass or maliciously hurt another. The Hearing Officer made extensive findings on this issue and determined that the Respondent was motivated by retaliatory feelings, was aware that the will contest could delay the guardianship final hearing and the ultimate determination of this proceeding; nonetheless, the Respondent believed he could win his claim based on the issue of undue influence. We agree with this assessment and, thus, find that the evidence is not sufficient to support a finding of misconduct. This conclusion renders moot Respondent's challenges to this charge.

The complaint charges that the Respondent's conduct is also violative of Disciplinary Rule 7-104(A)(1) in that he communicated with a party he knew was represented by an

attorney. In light of the foregoing findings, we further conclude that the Respondent engaged in the charged misconduct.

Lastly, the Complaint incorporates the entire course of conduct under one charge alleging a pattern of misconduct designed to damage Respondent's client, and charges a violation of Disciplinary Rule 1-102(A)(1), (2), (5) and (6) of the Code.

We find, as did the Hearing Officer, that this charge is repetitive and redundant; as such, we find no misconduct. In re Stanton (1986), Ind., 492 N.E.2d 1056; In re Sekerez, Supra.

Upon finding misconduct, we must now assess an appropriate sanction. As part of this deliberation, we consider the nature of the violation, the specific acts of the Respondent, its impact on the public, this Court's responsibility to preserve the integrity of the Bar and the risk, if any, to which we will subject the public by

permitting the Respondent to continue in the profession or be reinstated at some future date. In re Stanton, Supra; In re Duffy (1985), Ind., 482 N.E.2d 1137; In re Hailey (1985), Ind., 473 N.E.2d 616.

Reflecting upon Respondent's conduct vis-a-vis his client, Mrs. Smoker, this Court is not unmindful of the strong emotional involvement of all participants. It is, nonetheless, amazing that an attorney with Respondent's experience and length of practice, would undertake to draft a will for the elderly widow making him and his family substantial beneficiaries, without any real concern for the ethical consequences. Having once breached his professional duties, the Respondent embarked on further reprehensible conduct by harassing his client/ward and manipulating the judicial process to exact further retribution. The Respondent, motivated by his financial expectations and a desire for personal

vindication, lost sight of his professional obligations to his client and the ethical standards of his profession. In light of these considerations, the nature of the violations, the specific acts of the Respondent and this Court's responsibility to the public, we conclude that a period of suspension is warranted by respondent's acts of misconduct.

IT IS, THEREFORE, ORDERED that the Respondent, William Briggs, be suspended from the practice of law for a period of two (2) years beginning February 16, 1987.

Costs of this proceeding are assessed against the Respondent.

Dickson, J., not participating.

Filed 1/18/85

IN THE

SUPREME COURT OF INDIANA

IN THE MATTER OF

WILLIAM J. BRIGGS

Cause No. 1078 S 235

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HEARING OFFICER'S REPORT

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The undersigned, the duly appointed Hearing Officer for the Supreme Court of Indiana in this cause, having heard the evidence of the parties and the arguments thereon and having been presented with legal authority for review therewith, now makes his report to the Court. Upon the matters presented the report is divided as follows:

I FINDINGS OF FACT UPON VERIFIED AMENDED COMPLAINT pg 1

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| II | CONCLUSIONS OF LAW UPON VERIFIED AMENDED COMPLAINT | pg 33 |
| III | FINDINGS OF FACT UPON PROCEDURAL AND CONSTITUTIONAL ISSUES | pg 36 |
| IV | CONCLUSIONS OF LAW UPON PROCEDURAL AND CONSTITUTIONAL ISSUES | pg 52 |
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| VI | RECOMMENDATIONS | pg 57 |


All matters relating to this cause in the possession of the Hearing Officer and all documentary evidence offered or admitted in evidence during the final hearing in this cause are transmitted to the Indiana Supreme Court herewith. In the event that a transcript or partial transcript of the evidence needs to be produced, the reporter will need to obtain the documentary evidence for products on of such a transcript.

I

FINDINGS OF FACT UPON

VERIFIED AMENDED COMPLAINT

1. The Respondent is a member in good standing of the Bar of the Supreme Court of Indiana, having been admitted to practice before such Bar in 1954. The Respondent also is duly admitted to practice law before the Bar of the Supreme Court of Kentucky.

2. The Respondent is engaged full-time in the practice of law in Carroll County, Indiana, and maintains an office in Flora, Indiana. The Respondent previously has served as the duly elected Prosecuting Attorney of Carroll County. The wife of Respondent, namely Florence Anne Briggs, is also an attorney and is the respondent in Cause No. 783-S-262 before this Court and a companion cause to this matter; at their law offices the Respondents Briggs operated from

a common checking account and regularly presented themselves to participate in the representation of the other's clients, operated out of a common office, had common employees and sent letters on common stationary. Although they never formally had a partnership agreement or entered into any regular partnership or profit sharing arrangement, their personal finances were so interrelated that each benefitted from the practice of the other and that they annually attributed income one to the other in an unplanned method; that in addition they filed a joint income tax return but no partnership return; therefore while no formal partnership structure exists, this Officer funds that they held themselves out to the public as a law partnership operating as Briggs and Briggs.

3. That Mary Bernice Smoker, referred to throughout these proceedings as Kate Smoker, was a lifetime resident of

Burlington, Indiana, a small town located in Carroll County. She was an educated woman, serving as a teacher in the Burlington school for many years as well as at Indiana University-Kokomo extension and at the Charleton High School at Indiana Boy's School. She was the daughter of a country doctor named Chiddick who served the Carroll County area; she had a brief marriage which was reportedly unhappy, and spent most of her adult life as a childless widow. She inherited and owned farmland so that by her death in the late 1970s her estate consisted of approximately 282 acres of farmland and approximately $150,000.00 of cash assets. She resided in Burlington but took an active part in her farming operations through the mid-1970s; while Carroll County is generally extremely rich farm ground, her acreages were of poor quality for the area generally consisting of rolling land and subject to drainage difficulties; a substantial portion

of it was devoted to pasture for livestock and maintaining and caring for a cattle herd was one of her interests and activities. Most of her life she dealt with men and her interest in young people and securing their education usually centered around boys. Most noteworthy was that she was a bit of a local character, used to getting her way, willing to take advantage of a business situation, establishing a business history of backing out of executory land transactions or cattle sales, and unconcerned with dress (to the point of embarrassment by others) or social proprieties. In business matters Respondent described her as astute and wily. Her date of birth is October 25, 1894 so that she was quite elderly throughout these events and her physical health (which will be described) was generally poor; she constantly smoked cigarettes and chewed gum; she was loud and overbearing but she never swore.

4. Beginning in the mid-1960s and until the events described here the Respondent represented Kate Smoker throughout a variety of legal matters including several traffic accidents (one involving a rather significant claim against her), tenant disputes, real estate problems, insurance matters, and will drafting. After a period of some years he also began completing her income tax returns. In their attorney-client relationship she became rather demanding, interrupting other clients, seeking that her work be done first, seeking business as well as legal advice, and not hesitating to call during non-business hours. Representing her was time-consuming in a disproportionate manner to what attorneys would normally consider billable hours. After his first few small transactions for her, Respondent did not send her bills except for the income tax work. On one occasion, after working out a

pipeline easement for her, she voluntarily paid him $300.00. On another occasion, when he had done work jointly for her and another lady, he billed the other lady for half and was paid, but Kate Smoker did not pay her half. In 1967 she first mentioned that she did not want to pay him for all acts he performed but instead wanted a lifetime fee arrangement and, commencing in about 1970 the attorney and client had fallen into an understanding that he would receive $10,000.00 out of her estate. No steps to formalize such an arrangement were ever made, however, the only record being a bequest to him in her will for $1,000.00. He generally recognized the unusual nature of the arrangement but, because of her strong-willed nature he acquiesced in this fee arrangement.

5. The Respondent prepared several wills for Kate Smoker while he represented her. In 1967 the Respondent prepared

a will for Kate Smoker when she was in the hospital wherein, among other things, the Respondent was left a legacy of $1,000.00; this will was prepared under time pressures because of the hospitalization and did not well represent her desires. Accordingly it was soon thereafter superceded. In 1968 the Respondent prepared a new will for Kate Smoker. In the 1968 will, the Respondent again was given a legacy of $1,000.00. Further, the Respondent was named as co-executor of the will and the Respondent and Florence Anne Briggs were named to serve as attorneys both for the estate and for the educational trust created under the residuary clause. The said residuary clause created a perpetual, docketed trust named the Chiddick Scholarship Trust which was to provide scholarship grants for college to Burlington Township residents who were maintaining a C-plus average for their college years. (She had made similar trust

provisions in earlier wills.) In addition, however, she directed that additional clauses be added to favor Winston Briggs, the Respondent's son, naming him individually, so that he would be the first recipient with the trust accumulating income until he started college, and that it be payable to him regardless of residence or grade average and throughout both college and graduate or professional school. The 1970 will retained the legacy to Respondent and the trust provisions for Winston. Florence Anne Briggs was named co-executrix instead of Respondent. The trust was modified to provide for three years of accumulation after it was formed, except for payments for Winston, and contained a special clause to reimburse him in "an amount equal to the cost of his tuition, books, and living expense" for his school years.

6. At the time the trust was created in 1968, Winston was a 5 year old boy. He was not related to Kate Smoker in any genealogical fashion, nor were they at all socially related. Kate Smoker had met him and believed him to be a bright and attractive boy. This trust provision was entirely Kate Smoker's idea and there has never been any suggestion to the contrary. Respondent indicated at hearing that one of the reasons he was willing to put up with the unusual fee arrangements was because he was aware of this provision for Winston's education.

7. Kate Smoker had some knowledge as to the potential for difficulty she was creating by so favoring the drafter of her will. Accordingly she executed entirely on her own and without prompting from Briggses a holographic statement contemporaneously with the execution of her 1970 will as follows:

I, Bernice Smoker, have made my will today, February 24, 1970. I wish to state that I have not been influenced by anyone in making these bequests and I expect the provisions of my will to be carried out without questions, as I have designated it in my will.

Dated February 24, 1970.

Bernice Smoker

Witness:
Bertha F. Wolfe
David L. Norris
Jean C. Norris

8. Vic (Victoria) Cornell was Kate Smoker's first cousin and closest living relataive. She was also an elderly lady. They had agreed to make specific testamentary bequests to one another of $10,000.00. Aside from Vic Cornell, Kate Smoker had no natural object of her bounty. She expressed no particular desire to qualify her trust as a charitable trust pursuant to the federal estate tax code although it is fair to infer that she would have desired that result if it could be

obtained without destroying her other testamentary goals. Respondent was aware that naming Winston as a recipient endangered the eligibility of the trust for charitable deduction so that he did seek the opinion of an Internal Revenue Service estate tax attorney as to whether the trust qualified. While he claims to have received an indication that the trust would qualify, evidence was presented at hearing that, because of the provisions favoring Winston and the impossibility of assigning them a current cash value, the trust in total would not qualify.

9. At no time prior to the execution of Kate Smoker's 1970 will did the Respondent suggest to her in any manner that Winston should not be named as a recipient of trust funds, or that the Respondent should not be named as a specific legatee in the amount of $1,000.00, or that she should obtain independent legal advice on the

wisdom of naming the Respondent and his son as beneficiaries, or that she should have other counsel draft the subject will. No circumstances were present before or during 1970 that would have precluded her from seeking the assistance of other counsel in the planning or drafting of her will.

10. Kate Smoker had been treated for diabetes since 1966, for coronary insufficiency since 1967, and she had suffered a heart attack in 1969. In the fall of 1976 the condition of her general health began to deteriorate. On October 22, 1976, she was treated by her family physician Dr. Don Wagoner at his office for acute congestive heart failure and was admitted to St. Joseph Hospital in Kokomo. She was discharged from the hospital on October 26, 1976, with a diagnosis of acute pulmonary edema, inferior myocardial infarction, hardening of the arteries, diabetes, glaucoma, severe peripheral vascular

deficiency to her lower extremities, and depression although she was well oriented to time and place. Upon her releases from the hospital Respondent took her to a friend's Jessie Harness' home where she stayed approximately four days but the friend was unable to care for her because Kate Smoker was ill, could not sleep at night, and fell a number of times. Kate Smoker then returned to her home in Burlington, but she required someone to stay with and help care for her. During this period when she was living at home, she was morose and was not talkative when visited by friends. She visited the hospital emergency room on October 30 with a bowel impaction and visited the doctor's office on November 2, 4, and 5 because of bruises resulting from numerous falls. Dr. Wagoner believed that the falls were organic brain problems caused by decreased blood flow complicated by her diabetes. During this period of time he

believed her condition was an irreversible decline in her circulatory system complicated by the arteriosclerious and diabetes. Senility was commencing.

11. Kate Smoker continued to attempt doing her business. She was concerned about payment of the utility bills at her home and at her farm; although the farm bill should have been a tenant's responsibility she could not allow a disconnect because the water pump on that meter took care of her livestock. She had accumulated checks for deposit, one of which was several months old and one of which was in excess of $7,000.00. After assisting her to enter these checks in her ledger, Respondent accompanied her to the bank and made a deposit in the amount of $24,309.15. On November 2, she voted. Respondent visited her or talked with her by telephone throughtout this period of time.

12. On November 1 and again on

November 3, Kate Smoker had conversations with Respondent about the $10,000.00 attorney fee. She generally desired to modify her will to allow him the entire amount by will. He advised her that to do that she should go to another attorney and have the will prepared elsewhere. She didn't. He talked to her each of these days about the method that was eventually used - by Certificate of Deposit. On the evening of November 8, Kate Smoker telephoned Respondent to suggest three items of business that she wanted to do. She desired (a) to modify her will with a codicil, (b) make a nomination of Respondent as her guardian should a guardianship become necessary, and (c) finalize the arrangements for the $10,000.00 by arrangements on the Certificate of Deposit. Respondent completed these documents for signature the next day.

13. (a) At approximately 9:00 a.m. on November 9 Respondent went to the

Kate Smoker home with his secretaries Bertha Wolfd and Judy McKinley. Upon arrival (she was eating breakfast) he telephoned her friend (later a pallbearer at her funeral) John T. Johnson, suggesting that John T. would be doing Respondent and Kate Smoker a favor if he were to drop by her home.

(b) Respondent then reviewed the codicil (Petitioner's Exhibit 9) with her (Kate asked the secretaries to wait outside while he reviewed the terms), the witnesses were called in and the document was executed. John T. Johnson arrived during this period and was also asked to wait outside.

(c) John T. Johnson was summoned and the nature of the agreement he was to witness and his role as escrow agent were described. Banker Earl Rodkey was telephoned to come also; before Rodkey's arrival, Johnson had the opportunity to review the agreement (Petitioner's Ex 1) and observed Respondent review it line by line

with Kate Smoker. Rodkey arrived during this time and the document was described to him also. In essence the document created a $9,000.00 joint certificate of deposit between Mrs. Smoker and the Respondent which recited that the certificate of deposit (plus the $1,000.00 legacy provided for the Respondent in her 1970 will) was for past and future legal services and was compensation ". . . for all of the many kindnesses that (the Respondent) and his wife, Florence Anne Briggs, have done for me since I became acquainted with them in 1965". Johnson was to hold the certificate. Rodkey recalls that she asked whether signing these documents would affect her farm ownership. No one else recalls this question. During this conversation she indicated at least three times that she didn't want to make the Certificate and much preferred to pay him the entire $10,000.00 by her will; Respondent noted for her that he could not

ethically draft such a will and she remained adamant that she would not get another attorney; when she again raised the issue, Respondent said that if she didn't want to sign the agreement that they could forget the whole thing. Thereupon she agreed to sign it.

(d) To complete the execution of the document she clarified a possibly ambiguous pronoun in it, dated it October 9 and then corrected the date, and signed.

(e) She inquired of Earl Rodkey what interest rate she would receive on a $9,000.00 certificate and then asked if she could get the same rate as the minimum of $10,000.00 certificates. He indicated that he would have to get approval for that (the rate was 1/2% higher). He did so. She wrote a check for the $9,000.00 and signed a signature card.

(f) Sometime during the course of the morning (nobody ever testified as to

just when) she executed the nomination of Respondent as her guardian should a guardian for her become necessary. (Resp. Ex. B-15).

(g) After these documents were all signed and everyone else had left, Respondent and Kate Smoker left her home and walked the block to a local restaurant and had luch together.

(h) During the afternoon Kate Smoker again visited her doctor, Tom J. Wagoner. At the time he was not aware of her business activities of the morning. She was brought to the office by Joann Wilson, a friend because she had fallen again. She seemed alert but incorrectly stated the date by one year. She had a "staggery" gait and tendency to fall. His opinion, stated in numerous legal proceedings since then and again in this proceedings was that she was not competent to manage her affairs at that time because of this advancing senility. He suggested that her disorientation would not

be obvious to a lay person and that an inquiry such as the interest rate question was consistent with his observations; he did believe that the senility would manifest itself during an extended meeting with an attorney.

(i) The events of this date became a focal point for subsequent litigation and an understanding of them is necessary to understanding the conduct of the parties. Respondent wholeheartedly believes that Kate Smoker was competent on the date in question; besides his own observations he notes that Earl Rodkey and John T. Johnson, both community leaders and lifelong friends of Kate Smoker, felt that she was acting normally; he also suggests that Bertha Wolfe, his secretary, simply would not have countenanced any misconduct. In a transaction of this nature between attorney and client, the law attaches a rebuttable presumption of undue influence and, in the

subsequent trial in the "guardianship case" before Judge Munro, Respondent was unable to oversome that presumption and the legal services contract was set aside.

14. Thereafter her health deteriorated rapidly. She saw the doctor again on November 11, 1976 and had fallen five more times. On November 12, she had a particularly bad fall, striking her head on a bookcase. On November 13 Dr. Wagoner admitted her to St. Joseph Hospital in Kokomo and it was clear to everyone that unquestionably she could not then manage her own affairs. By November 16, she was transferred to Methodist Hospital in Indianapolis for examination by Dr. Russell, a neurosurgeon, for organic brain deterioration.

15. She was released from the hospital thereafter and returned home for a few days but was again admitted to St. Joseph Hospital on November 24 in a state of

complete disorientation. No one could tell if she would recover or not and some witnesses testified that during this stay they thought she was dying. Throughout this time Respondent visited with her and was aware of her condition.

16. On November 24, 1976 the Respondent was appointed as temporary conservator of Mrs. Smoker by the Carroll Circuit Court on the petition of Victoria Cornell. At the time of his appointment, the Respondent informed the Court that he was making no charges in the guardianship because he already had been compensated for any work in the guardianship and other future matters by a certificate of deposit.

17. Respondent began marshaling assets for the guardianship and attempting to order her business affairs. Since December 1 is annually the date for providing notice to tenants that their lease will not be renewed for the following year, he did

provide such a notice to Ron Unger, the tenant on this ground.

Kate Smoker had normally operated her farms with a crop-share tenant such as Unger, or had simply hired various stages of raising crops, from cultivation through harvest, done on a custom basis. Much of her land was devoted to pasture for livestock and she often was involved in partnership arrangements for ownership of a herd of animals or owning outright some animals with a hired hand to care for them. The farm properties had homes on them for use by hired hands or for rental income.

As Respondent anticipated the need for large amounts of cash for the medical bills and a constant income for possible nursing home placement, he anticipated the need to change these practices in favor of cash rentals of the farm ground. He was aware that she opposed this practice (it can lead to deterioration of farm improvements

and of soil quality) but thought her current needs made it appropriate. Accordingly he began negotiations with several local farmers, including Unger, to cash rent the property. Unger claimed an oral lease from Kate Smoker and in reliance on it had applied a plow down fertilizer.

18. Attorney Alan Brubaker, practicing in Kokomo, Indiana had been raised in the town of Burlington and had known Kate Smoker from pervious years as a town character and as a person who took credit for introducing his parents to one another. He had returned to practice law in Indiana commencing in 1976 and had been out of contact with her for a substantial period of time. He was informed casually by his father that Kate Smoker was ill and in the hospital and that he might wish to stop by and see her. He did so on his way home from his law office around 5:00 p.m. on Friday, December 10. He visited her for

approximately 20 minutes and found her to be in terrible physical condition. She could not see him and did not recognize him. She rambled in conversation talking about God and talking about dying. He was not aware that anyone was looking after her in anyway so that he left her his home telephone number on the back of a business card, slipped the card into her purse and left. He received a telephone call at home from Respondent the next morning. He described the conversation as commencing with "What in the hell are you doing visiting Kate Smoker?" He eventually understood that he was talking with her attorney and guardian and began to feel that he understood the concern of the Respondent, that he was attempting to steal a client. He felt that after some words of explanation that the Respondent was calmed down and that the telephone conversation ended professionally if not cordially. Respondent recalls making a

telephone inquiry of Alan Brubaker after finding the card which he believes to have been polite instead of harsh or belligerent. The tone of this conversation is one of the very few factual disputes in this entire case. This Officer believes that a belligerent tone was used to commence the conversation and that the conversation reflects a sense of proprietary interest by Respondent in his ward and in her business affairs.

19. On December 13, 1976 Kate Smoker was discharged from the hospital. Her condition was still not good but was stable. Respondent had received the opinion of Dr. Wagoner that her condition was irreversible and that she would permanently require custodial care. Respondent drove her home and had made arrangements for a suitable hospital bed to be placed there. He had also arranged for either nursing care, trained hospital volunterrs or

townspeople to always be available for assisting Kate Smoker. He was investigating nursing homes.

20. Thereafter, she made a remarkable recovery and by January 11, 1977, when Dr. Wagoner again examined her, he found that her mental impairment was "minimal" and her physical and mental problems were in a state of "remission". During this period of time she became aware of the guardianship, the restraints it placed upon her ability to do business, and the altered farm management goals. During this time on one specific occasion she appeared at Earl Rodkey's bank office, agitated over her inability to handle her affairs; she had heard of the joint certificate of deposit created November 9 and asked if it really existed. Rodkey showed her a copy of it and she professed no recollection about its making.

21. Notwithstanding her recovery, the guardianship was made permanent on January 13, 1977 after hearing in the Carroll Circuit Court. Kate Smoker advised the court at the hearing in Respondent's presence that she did not want the Respondent taking care of her as a conservator, that she liked to run her own business, and that she did not want any conservator. Dr. Wagoner testified about his examination two days before but continued to opine that she was incompetent in the belief that her recovery was temporary. The Carroll Circuit Court by Judge Smock believed that a permanent conservator was advisable under the circumstances and assured Kate Smoker that the Respondent would try to follow her desires with respect to the handling of her farming and other affairs.

22. During the next month, the long-standing and close personal

relationship between Kate Smoker and the Respondent deteriorated badly. Kate Smoker was exceedingly unhappy that she was under a conservatorship (the word "chafing" comes to mind). Further Mrs. Smoker was used to being in primary control of her own farming and monetary affairs, and she was exceedingly unhappy that the Respondent was principally in control of her substantial cash assets and had negotiated a cash farm lease for a portion of her farms without her consultation. She was allowed to write checks for herself, however, and her nurses and custodians were told by Respondent to take her wherever she wanted to go. During this period of time she began to consult with and complain to Bobby Ritchey, a local man then in his early 30's who had worked for her as a youth, who had resided with his parents on one of her farms, and who had been involved with her in occasional cattle transactions; whereas Bobby Ritchey and Kate Smoker had

previously been acquaintances and occasional business associates (she probably had thought of him like a hired man) they now became confidants and close friends.

23. In late January or early February (the exact sequence where this incident fits is not precisely clear) Kate Smoker came to Respondent's office to obtain her lock box key; he (correctly) wouldn't give it to her. Instead as part of the conversation he displayed the key to her and said something like "You don't like authority, do you?" This greatly agitated and aggravated her and further wedged apart her former close relationship to Respondent. The report of this incident was factually contested at hearing, the above description being that of Kate Smoker by deposition, secretary Judy McKinley, and by slightly different quote secretary Jean Jones; the respondents Briggs indicated that incident occurred when Respondent was in his office

with a different client and Mrs. Briggs was in her office on a Saturday when no secretaries were present, that Kate Smoker wanted to verify that he had the key, that he produced it, and that while she was leaving she tripped and fell which made everyone jump. The Officer believes the first description to be accurate with the thought that Respondent's statement was, at that juncture, thoughtless but not malicious, and not cognizant of the distress it would cause her. She perceived it as a calculated act degrading her.

24. Kate Smoker became increasingly disgruntled with the Respondent and in late January privately began conversation concerning the possibility of obtaining another attorney. She made inquiry of Alan Brubaker as to whether he would be willing to get her out of the guardianship. He indicated to her that he did not want to become involved in it and would not

represent her in the matter although he could, if she wanted, guide her to other attorneys. She later asked Bobby Ritchey to arrange an appointment with another attorney. He did so with R. Adrian Marks, a Frankfort attorney with whom Ritchey was casually acquainted. Ritchey arranged for the initial meeting between Kate Smoker and Marks for February 3, 1977 but that meeting date was changed when Ritchey was instead to meet with the Respondent concerning farm leases that date. Respondent was never made aware of the appointment.

25. On February 3, 1977, Bobby Ritchey together with another area farmer, Robert Gangwer, met with Respondent at his office to discuss farm rental. During the course of the conversation the Respondent offered to resign as guardian if Bobby Ritchey would take over that task; Ritchey declined. Upon returning to consult with Kate Smoker, Ritchey described to her

Respondent's plan for cash rental which, he indicated, included removal of certain fences to allow for bigger fields and anticipated plowing and planting of permanent pasture. Naturally she again became agitated.

26. On February 4, 1977, in the evening hours, Bobby Ritchey took Kate Smoker to an interview with attorney Marks at his office. The interview lasted two and a half hours. She outlined her goals as, first, stopping Respondent from altering the basic nature and "complexion" of her farming operation and, second, to get the guardianship terminated. Marks required her to be examined by two physicians. During this time it is safe to assume that she poured out to him her frustrations over no longer managing her own affairs. Marks arranged for examination by Dr. Beardsley, a Frankfort physician, and Dr. Bowman, a Kokomo psychiatrist.

27. During the next days she was examined by Dr. Beardsley at his office. The doctor, not knowing that the report was for court purposes, gave her a standard examination, took a history and otherwise conversed with her sufficiently to determine that she was pleasant, lucid, and well oriented. He believed her to be competent to manage her own affairs and he reduced his report to written form on February 9, (Comm Ex. 5). Dr. Bowman examined her on February 7 at his office in Howard Community Hospital for seventy minutes. He believed her to be in the early stages of senility and diagnosed the condition as mild chronic brain syndrome. While she showed some confusion during the interview he believed her to be competent to manage her affairs and he too reduced this to written form that date. (Comm Ex. 7). He did not expect to have further contact with her but in fact later did provide some supportive

psychotherapy for her as will be reported. Both doctors made their results known to Marks.

28. Respondent and Kate Smoker spent some time together on February 6 visiting a friend at a nursing home. On the way home Respondent reported to her that he had talked to Judge Smock about the possibility of his resigning because of the strain this was causing their relationship. He indicated to her that she could prevail upon a bank to serve as guardian. She indicated that there were too many new people at the bank and that besides, she didn't want a bank, that he should not resign unless or until a new guardian could be located. He remained entirely uninformed about her contacting other counsel or other doctors; they did discuss however that she was seeing Dr. Wagoner weekly and that it was becoming apparent that he would have to change a mis-diagnosis.

29. Between February 7 and the end of February 9, the exact time and circumstances not being adequately described, Kate Smoker did inform William Briggs that she had been in contact with another attorney, namely R. Adrian Marks of Frankfort, Indiana. It is not clear that she described the extent of her interviews with him and it is also not clear that she had indicated that she had been seeing doctors for purposes of examination to end the guardianship; the best evidence would seem to indicate that she did not inform him concerning the doctors. During this period of time since the guardianship was made permanent she remained in essentially daily contact with Respondent over various matters.

30. On Wednesday, February 9 Respondent was in the town of Burlington as counsel attending the meeting of the Burlington Town Board. After that meeting he had a brief conversation with Kate Smoker

at her home in which the matter of his resignation was again discussed but she noted that if he resigned a bank would be named to replace him and she did not desire that.

31. On Thursday, February 10, 1977 the first communication between attorney R. Adrian Marks and the Respondent occurred. It was filled with the abruptness and animosity which has plagued any relationship between these attorneys from that day to this. On that date Attorney Marks telephoned Respondent to indicate that he desired to come to Respondent's office to discuss the matters pertaining to Kate Smoker. Respondent indicated that he would be willing to have a meeting only if Kate Smoker were present. This difference became heated and the conversation was abruptly ended by Marks hanging up. He did call later in the day to indicate that he would not be coming.

32. On Friday, February 11 Kate Smoker was twice present at Respondent's office to discuss minor matters concerning the terms of a written lease that was being concluded with tenant Ron Unger. Respondent's notes indicate that she requested him to accompany her to Marks' office to pick up certain tax papers on that day and that he declined to do so. That evening she met with Bobby Ritchey and described the events of the day. She eventually asked him to stay over night with her. During the course of the evening at 7:00 or 7:30 Respondent called Kate Smoker at her home to discuss some minor business matter. She did not mention Ritchey's presence. Within a few minutes of the termination of that conversation, he called again, ostensibly on the same topic but he also inquired if any one was present with her, to which she responded in the negative. He thereafter telephoned the Burlington town marshall and asked him

to check on her. The town marshall did so, making up some inane excuse about peeping-toms; he duly reported to Respondent that Ritchey was there.

33. On Saturday, February 12 Respondent arrived at Kate Smoker's home quite early in the morning, approximately 7:30 a.m. According to Ritchey's testimony, he tapped at the door, then burst into the house and upon her being awakened she stated to him "Bill Briggs, are you nuts?" Respondent indicates that no such comment was made, that he did knock on the door and upon coming into the home that she was not friendly in that she had not had her insulin. A heated discussion followed between Ritchey and the Respondent concerning the care of Kate Smoker and what she would be doing later in the day. Ritchey had anticipated taking her to a birthday party that evening and possibly having her stay over night at the Ritchey home that

night. The Respondent looked upon that unfavorably at the time and further discussion resulted; the tone of the testimony makes clear that a serious confrontation between two stubborn men occurred here. Neither Ritchey or Respondent would leave before the other left so that eventually they left simultaneously. Respondent called Kate Smoker later in the day and indicated to her that it would be satisfactory for her to go to the birthday party and in fact she did accompany Ritchey and his family members to a birthday dinner at a Frankfort restaurant that evening. Later that day the Respondent submitted two petitions to the Judge Pro Tem, Judge Smith (Judge Smock was undergoing serious health problems at this specific time and was in the process of resigning; Judge Jeffrey R. Smith was not the regular Judge of the Court although he was the only Judge available in Carroll County at the time; the record in the legal

proceedings suffers during this period of time because some of the documents hereafter referred to were delivered directly to him at his law office and were file stamped at later times). Respondent's petitions (1) that the Court issue a temporary restraining order, restraining certain persons particularly including Bobby Ritchey and his family members from interference with his relationship with his ward and (2) objecting to the filing of any papers or pleadings allegedly signed or authorized by the ward and further seeking a protective order against his production of any documents should such allegations be made. Judge Smith was well aware of these requests at the time and subsequently made a record of overruling them.

34. On Sunday, February 13 as a result of the scene the previous day and her frustrations with the guardian and the guardianship, Kate Smoker contacted attorney

Marks directing him to immediate action for purposes of terminating the guardianship. He in fact interviewed her twice during that day, first whereby she requested immediate action and they discussed the nature of what it would be, whereupon he prepared a petition to removal and second at her home in the presence of Bobby Ritchey whereby he read through the Petition to Remove with her reviewing the document line by line and having her (or her and Ritchey) initial the specific facts and allegations therein that they could document.

35. On Monday, February 14 Attorney Marks presented the Petition to Remove to Judge Smith who scheduled the matter for review for Friday, February 18. Judge Smith indicated to attorney Marks at that time that the petitions described above were submitted on the preceding Saturday.

Respondent's receipt of the Petition to Terminate evoked anger and emotions

in the Respondent which have not subsided. His reaction as he described it when reading the petition was as if someone had "taken a strap and belted him in the face" and that he felt required to oppose and fight the allegations against him because of their nature. Further, he felt that Kate Smoker had deceived him by not revealing to him sooner her visits to Doctors Bowman and Beardsly.

36. On some date between February 14 and 19, the exact date being unknown an incident which has been referred to throughout these proceedings as the "fish story". Essentially three versions of it exist. Respondent and Mrs. Briggs testified that Kate Smoker called their home to discuss other business matters. She inquired as to how Respondent felt towards her concerning the Petition to Remove and in response to her he read to her the fronticepiece from a new book named The Shad Treatment as

follows:

> He would introduce his bills in committee and the chairman would always thank him. They were always very courteous. They'd say something like 'We'll be glad to give this bill due consideration' and of course, before the session was over, they'd have chopped everyone to ribbons and finally one day when someone told him that his bill would get due consideration, he let all of his frustrations out. He reared up, eyes flashing and he stuck out his finger and he said, 'Yes, Mr. Chairman, I know the consideration you'll give this bill. It's the consideration of the fisherman for the shad, Mr. Chairman, he said. 'When the fisherman catches the shad and brings it into the boat the poor fish flips and flops and tries to escape and the fisherman speaks so politely to the shad. He says, 'Lie still, little shad, I am not going to hurt you. I am going to treat you well. I'm not going to do a thing to you except cut your tail off and I'm not going to do a thing more to you except cut your head off. And after that I'm not going to do a thing to you except cut all your bones out.' And he pounded on the committee table and said, 'That's the consideration I expect from you, Mr. Chairman, the shad treatment, Mr. Chairman. . . .the shad treatment and I may have to take it, but I will fry in hell before I say thank you.

Respondent then concluded the conversation with something like, "That's just the way I feel. I may have to take this from you but I will fry in hell before I say thank you."

A second version was presented by the Briggs' then secretaries Ruth Jean Jones and Judy McKinley, Ruth Jean Jones indicated that during a weekday early morning hour, before 9:00 o'clock, Respondent telephoned Kate Smoker in her presence and read from a "slick cover" magazine a story substantially similar to the story quoted above. Upon completing the reading, he then hung up the phone in her ear, conduct which the secretary considered shocking and which she immediately reported to fellow secretary Judy McKinley. McKinley confirmed that Jones had reported it and was clearly distraught over something at the time.

A third version was provided by Kate Smoker during a later interview by Dr.

Bowman. She described to him that one of the items caused by Briggs that was causing her stress was an example of an early morning telephone call that awakened her, that during the call he related to her a bizarre fish story about a fish being carved apart and that she interpreted the story to mean that her estate would be carved up through the litigations that her actions at that time seem to be developing. The doctor indicated that Kate Smoker would have been capable of abstract reasoning but that she did not draw this conclusion on her own; instead at the conclusion of the story the Respondent asked her "Do you get the point Kate?" and that the point consisted of the carving up of her estate. Dr. Bowman indicated that she was not scared or revolted by the story, only amazed that Respondent would tell it to her. Bobby Ritchey also described an amazed attitude.

It is not clear which of these descriptions of the incident is most accurate, nor are the descriptions mutally exclusive; it is even possible that more than one conversation occurred and that all of the descriptions are accurate in some respect. Should this Officer have to choose one description as being the most accurate description of the event, this Officer would choose the description of Dr. Bowman. In any event it is clear that the event occurred at a time of great stress in the relationship between Briggs and Smoker, at a time when her health was not good and that a stressful incident could have a detrimental effect upon her emotional health, and that the story as recited to her was reasonably calculated to provide her further stress and discomfort. It may have been the response of a former friend aggravated by a specific situation but it can not be considered the proper response of an attorney at law and

counsellor or of an attorney acting as guardian of the person and estate of that individual.

37. On Friday, February 18, 1977, Respondent together with Mrs. Briggs, attorney Marks and his associate attorney in this cause, Samuel Power, met with Judge Smith in a pre-hearing conference. As a result of that conference Judge Smith ordered written reports from Doctors Bowman, Beardsly and Wagoner concerning Kate Smoker's physical and mental condition to be submitted as part of the record in the conservatorship cause. While returning home following such hearing, Respondent engaged in a lengthy consultation with Mrs. Briggs concerning the advisibility of filing his Petition to Terminate the conservatorship on the basis of Kate Smoker's now apparent competence; he had prepared such a document and taken it to the conference but had not filed it or displayed it at the conference. He eventually

concluded that the filing of such a document was appropriate so that he returned to Delphi and filed it. It includes his statement without reservation that the conservatorship should be terminated, stating reasons therefor, and referring in his petition to the findings of Dr. Beardsly and Dr. Bowman. He noted that because of the conservatorship Kate Smoker was extremely unhappy and had a "frantic feeling" and further noted; "Until the conservatorship is terminated Mrs. Smoker will always be unhappy and will not be free from the influence, ministrations and manipulations of others."

38. Within the next days Kate Smoker indicated a desire to Attorney Marks to prepare a new will. She had mentioned this in her initial interview but he refused to even have a discussion with her about it until she obtained competency examinations. Thereafter, he did have a lengthy interview

with her about what she wanted. He did not have access to the will prepared by Respondent some years before with the educational trust. He had to rely upon her memory for that information because she did not wish to ask Respondent for a copy of it. When she described the nature of the trust that she desired, he approved of such a bequest noting that he had been aware that such an arrangement could be set up without cost by the Indiana Universtiy Foundation and could be established excusively for the Burlington community. She noted, however, that she was now not going to participate in such a program noting "that the whole idea is now spoiled for me" and that now she desired to make a series of specific bequests, to make the bequest of a modest amount of farm land to Bobby Ritchey and that the residue of her estate be divided equally between trusts for the Burlington Methodist Church and the Burlington Cemetery. In fact, Attorney

Marks prepared that will for her and she executed it before witnesses on February 23, 1977. Five days later she added a one page codicil, adding two quite modest specific bequests. Except for herself and Marks, the other actors in this drama, particularly including Bobby Ritchey, were not aware that she had made a new will for quite some time.

39. After the filing of the Petition to Remove by Attorney Marks and the Petition to Terminate by Respondent, the Respondent began delaying and resisting action on these petitions. On February 23, Mr. Marks sent a letter to Mr. Briggs agreeing to the granting of the Respondent's Petition to Terminate, and submitting a suggested form of decree for the purpose of ending the conservatorship, as asked for by the Respondent in his petition. The Respondent did not answer the letter. About one week later, Attorney Marks telephoned the Respondent as to the possibility of such an

agreed termination order. Respondent answered Marks by telling him that they would be able to talk when Marks "got the animosity out of his heart". Marks indicates that his reply was "quick and pungent". A few days later Mr. Power, Kate Smoker's other new attorney, called the Respondent to discuss action on the Petition to Terminate. Respondent refused to agree to the granting of his own Petition to Terminate. In a letter written on May 2, 1977, to Special Judge Munro who had since qualified in the guardianship, the Respondent informed the Special Judge that he had informed Mr. Power that ". . .before I, myself, would agree to any order of any nature, including a dismissal of their Petition to Discharge, etc., there would have to be a finding that certainly I had NOT mismanaged the funds of Mrs. Smoker in any way."

40. Judge Munro was selected and qualified on February 28, 1977, and he set a hearing to be held on all pending petitions on April 19. Between March 9 and March 15, the three physicians filed their written reports with the Court in which each of them affirmed that Kate Smoker was of sound mind and capable of managing her own affairs. On April 12, failing to get an agreed entry signed by the Respondent to his own Petition to Terminate, her attorneys filed a reply to the Petition to Terminate that admitted the allegations that the guardianship should be terminated. Shortly before the scheduled April 19 hearing, the Respondent discovered that he would have to be in Washington, D. C. on other legal business, and the court granted a continuance and rescheduled the hearing for May 11.

41. On April 19, Kate Smoker's counsel filed a Motion for Summary Judgment on the Respondent's Petition to Terminate,

pointing out that the pleadings showed that the parties and all of the physicians were in agreement that Kate Smoker was mentally competent. On May 6, the Court entered an order limiting the hearing on May 11 to the issues raised by the Respondent's Petition to Terminate and also informed counsel that, since by agreement the physicians' reports were part of the record, the court would take judicial notice of them and it would not be necessary for any party to call any of them as a witness at the hearing.

42. On May 11, Mr. Briggs filed his "Objection to Court Order", objecting to the reception of the doctors' reports and to limiting the hearing to his own Petition to Terminate. On the same date, the Respondent filed his "Affidavit and Response of William J. Briggs Conservator To Motion for Summary Judgment". In this pleading, the Respondent argued strenuously that the granting of a judgment on his Petition to Terminate,

without also hearing the Petition to Remove, would do "irreparable harm" to the Respondent because the Petition to Remove "has cast doubt on the character of William J. Briggs by innuendo." He insisted that the doctors should have to appear personally in court and be subject to cross-examination. He alleged that their reports were "inconclusive" and "inconsistent with one another". He insisted that, since he had had his reputation impuned, he should have the privilege of cross-examining the doctors in court.

43. On May 11, the Court proceeded with the hearing on the Respondent's Petition to Terminate, and all of the evidence was heard thereon except that of Dr. Wagoner. Since the Respondent wished to call Dr. Wagoner as a witness and he could not be present on May 11, the Court, on the Respondent's motion, granted a continuance to May 26 to permit Dr. Wagoner to testify

in person. On that date, following his evidence, the conservatorship was terminated by the Court.

44. During the period of time from the filing of Petition for Removal by Attorney Marks and the ultimate return of control of her property to her, Kate Smoker was subjected to constant fits of distress, anxiety, and worry. The record of this case is replete the examples of individuals stopping by her home to see or check on her and finding her in various stages of emotional display concerned over property control or upset because of some specific situation that had occurred. The most serious example is presented by the testimony of attorney Alan Brubaker who received a garbled and near hysterical call from her on one occasion to stop by to talk with her. Shortly thereafter when he arrived at her home, he found her to be sobbing uncontrollably, literally tearing

her hair out of her head, and incapable of speaking sufficiently to even explain the cause of her distress. He described that she would cry for 8 to 10 minutes and then wail "how could he do this to me?" and relapse into a new fit of despair. After three to four hours that evening, he was able to get her settled down so that she was no longer in such an emotional state but he never was able to conclude the event that had caused this display.

Throughout this period of time by far the vast majority of these emotional upsets were the result of events concerning the Respondent and his control over her property but it must be indicated that the entire situation was the cause of her upset, that is the continuation of the guardianship and her own inability to gain control over her property. Bobby Ritchey described one event where the apparent cause of her upset was caused by Attorney Marks where the vast

majority of what he understood from her was that Marks had let her down and that Sam Power was a crook and that she was disgusted with the entire course of events.

During this period of time several themes to her emotional upset recurred. She was upset that Respondent on some occasion apparently indicated to her that he would not be able to get her taxes done on time unless she helped him get out of the "guardianship mess," an allegation which he denies. She indicated on other occasion that the legal proceeding seemed to be continually delayed and that he had indicated to her that she would never be out from under the guardianship and that he would simply obtain continuances whenever trial dates neared. She was terribly embittered over the continuances of April 19 and May 11. She indicated on other occasions that he denied her access to the medical reports, and had indicated to her that the medical

reports would not do her any good and that he would find a way to either disparage them or keep them from the judge. He denies having made any of these comments to her. She repeated on many occasions that he had told her that when this whole case was over her estate would not be worth fifteen cents; he denies making a comment such as that but he does recall having a conversation with her concerning the ultimate result that these legal expenses would have upon her estate, a conversaton in whichh he believes he stated to her that there would be legal expense and that the ultimate losers of any legal proceedings would be her and himself, the Respondent.

Throughout this period of time, it is clear that her emotional state was far worse than normal but that the items of concern for her did involve business matters or her estate planning matters which would be natural causes for her concern, an

indication that her capability of managing her own business affairs probably remained intact. While the condition of her physical health probably added to her inability to control her emotions, it is clear that the circumstances surrounding the guardianship proceedings also greatly exacerbated her emotional distress.

This officer would be hard pressed to improve upon the observation of Judge Munro: "The termination of a conservatorship, where three physicians unanimously agree that the ward is restored to competence, normally would be a simply and routine matter. While the decision must be made by the court exercising independent judgment, even if all parties are agreed, in a normal case it is something that would be done routinely and promptly as soon as the fact of competence became apparent. In the matter at hand, the Respondent treated the entire matter as an adversary proceeding,"

apparently believing that he would face allegations of the improper creation of the guardianship if he simply went on record as agreeing to end it. He did so fully aware of the emotional upset being caused to her and for purposes ultimately designed for his own benefit, namely, to protect his own reputation.

45. Immediately following the granting of the termination of the guardianship, Kate Smoker executed another codicil to her 1977 Will in which she reaffirmed its terms as well as the terms of the codicil made a few days thereafter.

46. Judge Munro's termination order of May 26 directed specifically that Kate Smoker could take over her business affairs immediately and receive her business mail immediately, that the Respondent was to file a written final report within two weeks. That $2,000.00 was to be transferred to Kate Smoker for her immediate use, that

her Will, tax papers and other papers would all be made available to her at the time that final report was submitted. The date of June 9 became a date of substantial importance to Kate Smoker; that was the date she was to receive all of the items not immediately delivered. The date was apparently of less significance to Respondent however. He was expending substantial effort to filing a written final report, but had no plans to deliver documents and other items that date. In fact, Attorney Marks came to the Briggs law office to pick up certain items armed with a power of attorney from Kate Smoker and a specific directive to deliver papers. Respondent was absent, working on another matter and the result was a confrontation between Marks and Mrs. Briggs during which Kate Smoker was consulted by telephone and both participants became livid at various times.

Specifically, three items were the ultimate causes of further friction: (a) Respondent understood that the $2,000.00 was to be made available to Kate Smoker for payment of quarterly estimated taxes, not as operating funds; this money was made available before June 15, but Respondent gave it no priority; (b) numerous business papers including checking account records were not timely delivered; no doubt the sheer volume of materials had something to do with that but it caused Kate Smoker further distress; (c) the lock box key was not returned as Mr. Briggs desired a witness to the transfer of its contents but took no steps to arrange it; Attorney Marks suggests that Respondent was simply holding the certificates hostage to secure a favorable resolution of fees issues and indicates that Respondent told him "We'll talk about keys after we settle our fees;" (Respondent heatedly denies any such statement). The lock box key was

delivered August 2, 1977. It is clear that Respondent took no special steps to return the key, a fact of special significance because of the earlier "lock box key" incident. This episode again further embittered Kate Smoker about Respondent and his motives.

47. With the filing of the Respondent's final report, the Respondent objected to being required to file a claim for services as a conservator or as an attorney. He argued in his objection that he had undertaken these services as part of the life time contract that he believed himself to be under with Kate Smoker. These objections were overruled and ultimately he was directed to file a record of his time expenditure in the case and a statement of account. His filing in this regard stated that his service as a conservator and attorney and Mrs. Briggs' services as attorney, when computed upon hours of service alone,

were reasonably worth the total sum of $17,585.00.

The guardianship was opened on a preliminary basis from November 24, 1976 to January 13, 1977 and on a permanent basis from January 13 to May 26, 1977, a total period of 6 months and 2 days. Total assets consisted of 282 acres of farm land and cash assets of approximately $150,000.00. Total income during this period of time was $5,893.68 and total expenditures were $16,019.14. While even under the special circumstances of this case, this Officer believes that a fee of $17,585.00 would in fact be an excessive fee, the record well reflects that the ultimate goal of the Respondent was not to seek that amount of recovery for fees but was instead to assure his life-time services contract and the payment of the $10,000.00 under it. Certainly his prayers for relief were in the

alternataive but his efforts were bent upon proof of the validity of the contract.

48. Lengthy and acrimonious proceedings towards final hearing upon the closing of the guardianship followed. Allegations between Respondent and Attorney Marks and Power followed which included an effort to bar Respondent from communicating with Kate Smoker and, more significantly, a filing by Attorney Marks of certain pleadings in camera before Judge Munro which later became the basis of a defamation counter-claim by Respondent against Kate Smoker, Adrian Marks, and Samuel Power individually. During this period of time the Respondent also became aware that Attorney Marks, later supplemented by Attorney Power and Kate Smoker, had filed a complaint before the Disciplinary Commission which ultimately gave rise to this proceeding. Ultimately all of the matters scheduled for conclusion as part of the

guardianship final report including (a) final determination of Respondent's statement of services as attorney and conservator (b) ward's preliminary objections and final objections to the report (c) Respondent's claim for damages because of defamation and (d) a claim for personal injuries and damages against the Respondent by the ward were all scheduled for hearing to commence December 3, 1979.

49. That during the period of time from May of 1977 to 1979, Kate Smoker managed her own affairs and was not under guardianship. There is no indication during that time that she was unable to execute a new will or otherwise modify the will that she had made in 1977. During that time she remained close to Bobby Ritchey as well as other former friends but did not remain friendly with Respondent. As Dr. Wagoner had predicted, her health remained on a gradual downhill course. She returned for

four more visits with Dr. Bowman, at first to ventilate her frustrations with the guardianship, with Respondent, and with the whole legal process. Other visits were more in the nature of examinations for a competency determination as a witness. Her health did not deteriorate to the levels it had reached in November of 1976, but Dr. Bowman's records reveal a gradual erosion of her alertness and increased symptoms of senile dementia. He saw her last just a few weeks before her death and she was not sharp.

In anticipation of this sequence, her evidentiary deposition was taken for this proceeding on November 22, 1977.

50. Mary Bernice Smoker passed away on November 21, 1979, approximately 2 weeks prior to the commencement of the Court trial scheduled on the final report on her conservatorship.

51. On the following Monday, November 26, 1979, the Respondent filed sworn objections to the probate of "any will or cidicil) of Mary Bernice Smoker subsequent to the date of February 24, 1970 re."pursuant to statute. Such objections resulted in the impounding of Mrs. Smoker's 1977 will and codicil when they were presented thereafter for probate. The Respondent's purpose in filing such anaction at that early juncture was to obtain the appointment of a "neutral" administrator of theestate, preferably a financial institution, who would not hire Marks and Power as their counseland who would, therefore, be moreamenable to settlement of the pending claims. Judge Donald Myers, then regular

judge of the Carroll Circuit Court approved the ClintonCounty Bank and Trust Company of Frankfort,Indiana, as special administrator; this was the representative named in the decedent's 1977 will. This administrator promptly hired Marks and Power as counsel.

52. Respondents' ultimate purpose in contesting the 1977 will and codicil was to preserve his own claim and all of the family benefits which the prior will of 1970 contained. Respondent undertook this contest fullyaware of the existence of this disciplinary action pending against him. While it is safe to assume that his filing couldwell delay the guardianship final hearing (it did not) and that it would delay the ultimate determination of the proceeding (this file contains correspondence that a disciplinary trial would await the results of the guardianship hearing) and while it is further safe to believe that retaliatory filingsagainst Marks and Power controlling the final the final determination of the

Smoker Estate did at least cross his mind, the ultimate decision to prosecute a will contest, no doubtmade after an adverse determination in the guardianship, was grounded in the appropriate litigant's decision that he believed he could win the claim. These considerations of the "winability" of the case and the risk of further disciplinary filing appear to be the major areas of discussion as to whether to proceed.

The decedent's competence at the time of the execution of the 1977 will and codicils was never challenged. the entire lawsuit was fought over the issues of the use of undue influence upon the decedent and whether the 1977 will was a product of such influence. Respondent correctly believed

that a jury would be instructed upon "undue" influence essentially as follows:

> False statements and accusations to a testator concerning the objects of the latter's bounty with the intention and effect of alienating her affections and causing her to make certain testamentary dispositions of her property may be a circumstance to declare the will void for undue influence. Attacking the reputation or character of a person may be the means through which undue influence or fraud invalidating a will is perpetrated. Undue influence may consistin arousing bitter feeling that would be unwarranted if the whole truth were known; such influence maymay be achieved by initiathalf-truths so directed that they will, in all probability, reach the person to be affected, to the

> injury or prejudice of another person, and once the bitter feeling has been aroused, it can be kep alive and the memory of it sharpened and even magnified by repetition.

Factors in this case which led respondent to believe that he could well previal upon thisstate of the law were (1) that Bobby Ritchey, the individual who had taken decedent to Marks' office, had benefitted more from thiswill than any other person, going from a $2,000.00 specific bequest to a 92 acre farm (2) the pattern of the previouswills she had drafted had always been to create an educational trust, even before she met Respondent, but no educational trust was left in the 1977 will (3) thechurch and the cemetery had received

modest specific bequests beefore, but nothing in scope like the residue of the estate (4) Dr. Wagoner had already provided testimony that from February 3, 1977, to May 26, 1977, that she could be unduly influenced. The Respondent also argues that other items in the will which reflect that it was hurriedly prepared buttress this position; those arguments are much less convincing.

53.Trial on the guardianship t
final report and the related matters thereto was held over a period of 30 trial days from December 3, 1979, to August 7, 1980. At the conclusion of that proceeding Judge Munro rendered his determination of the matters presented on November 5, 1980; as the Court of Appeals, Second District reviewed that matter by decision of August 9, 1983, cited at 452 N.E. 2d 989 (rehearingdenied, transfer denied). His determinations are here summarized as follows: (a) the final report was

approved in all respects except for guardian's fees and attorney fees, all of which were denied based upon apparent conflict of interest; (b) all claim by Respondent to the $9,000.00 certificate was set aside and the underlying contract for life-time legal services was rescinded upon a theory of undue influence; (c) the Smoker's administrator's claim against Respondent for misfeasance in the management of estate assets was denied upon the theory that she always had funds to do as she wished, included in her argument here was an attempt to recover for injuries from psychological abuse and emotional strain, but the judgment was that her death rendered any issue here moot; (d) the defamation claim by Respondent was upheld but no damage had resulted therefrom; ultimately a $1.00 award was made on that claim; (e) fees for $25.00

were awarded for the time period between the signing of the life-time contract and the guardianship formation in November, 1976. The Court of Appeals set aside the $25.00 award and ordered appellate attorney fees paid.

54. The will contest case was scheduled to commence in late November, 1980, a matter of days after Judge Munro's decision was handed down.

55. On October 29, 1980, Florence Anne Briggs ha;d written a letter toopposing counsel of record regarding a desire to discuss a settlement of the Will Contest using as a frams of reference the attorney feesand other defense costs which the Smoker Estate would likely expend in all phases of the litigation. Mrs. Briggs undertook to advise Attorney Huffer one of the opposing counsel in her letter that Huffer was representing parties with

conflicting interest since he represented specific legatees as well as residuary legatees, the latter parties being the parties ultimately charged for defense costs. Mrs. Briggs told Huffer in her letter that the factsconcerning the different interests of his clients should be communicated to and clearly un derstood by Huffer and theBoards which govern the residuary legatees.

56. On November 5, 1980, Charles R.Vaughn, an attorney in Lafayette, Indiana, entered his appearance in the will contest case for numerous defendants, including the Burlington United Methodist Church and the BChurch and the Burlington Cemetery Association.

57. On November 8, 1980, Mrs. Briggs conveyed to Charles R. Vaughn a written offer to settle the Will Contest and the Respondent's claim in the

Smoker Estate. The settlement offer proposedthat the contestants be paid the sum of $29,250.00 by the Smoker Estate, such sum being three-fourths of the attorneys fees which Mrs. Briggs estimated, the Smoker Estate would expend in further defense of the Will Contest. The settlement offerconcluded with the admonition by Mrs. Briggs that, since it was her opinion that Mr. Vaughn was representing defendants in the Will Contest who hadconflicting interests, Mr. Vaughn had an obligation to fully and completely discuss the settlement offer with all parties represented by him. Because of the language of a letter sent to the Church Board, copy to respondent and Mrs. Briggs, that their offer contained "nothing new," Mrs. Briggs felt that further pre-trial steps were necessary to assure thatthe offer was fully conveyed.

58. On November 10, 1980, Mrs.

BBriggs telephone (sic) the Special Judge in the Will Contest, Robert Leirer Justice, (then a practising attorney, now regular Judge of the Cass Circuit Court) and inquired of Judge Justice whether she could contact persons associated with parties defendant in the Will Contest to determine if her settlement offer had been conveyed to such parties by their counsel. Judge Justice informed her that, in his opinion, she ethically could contact such persons provided that they did not hold "decision-making" positions with a party defendant. None of the counsel representing the defendants in the Will Contest were privy to thetelephone conference above described between Mrs. Briggs and Judge Justice, but the Respondent was well aware of such conference and its content.

59. Shortly thereafter, the Respondent telephoned Reverent Arthur A.

Schenck, a retired United Methodist pastor for whom Mr. Briggs had drafted a will in 1971. Reverend Schenck was a resident of Burlington, Indiana. By virtue of his residence and retirement status, Reverend Schenck was a member of the Burlington United Methodist Church and a member of such church's Charge Conference and Administrative Board, the bodies within such Church that had the decision-making power with respect to the Church's participation (if any) in the settlement of the Will Contest. The Respondent asked Reverend Schenck to come to the Briggs's law office in Flora and Reverend Schenck obliged.

60. Reverend Schenck met at the Briggs's law office with the Respondent and

Mrs. Briggs. The Respondent advised Reverend Schenck that he wanted to be certain that a settlement offer he had made in the Will Contest had been communicated to the Church. The Respondent further told Reverend Schenck that he wanted his settlement offer presented to the Church Board but that the Respondent could not present the offer himself because the Church's attorney, James R. Huffer, had forbade such a presentation. The Respondent further told Reverend Schenck that the offer had to be presented by someonewho was not a member of the Church Board, **whereupon** Reverend Schenck advised the Briggses that he was an ex-officio member of the Board. The Respondent informed Reverend Schenck that Respondent had a claim for
17,000.00 for services performed for Kate Smoker and that he would dismiss the

Ralphwill contest if he was paid $29,000.00. The Respondent requested Reverend Schenck to ask the pastor of the church, Reverend Ralph Karstedt, to appoint someone who was not a member of the Board to present the Respondent's settlement offer to the Board.

61. Reverend Schenck promptly went to see Reverend Karstedt at the Burlington United Methodist Church. Reverend Schenck informed Reverend Karstedt that the Respondent had contacted him about the Will Contest and that the Respondent wanted the Church to be aware of his settlement offer and the amount of the settlement offer of $29,000.00. Reverend Schenck asked Karstedt to see to it that the Respondent's settlement offer was conveyed to the Administrative Board and told Reverend Karstedt that he had been told by the Respondent that the Church

probably would save money by accepting the settlement offer and that such a settlement would be to the Church's advantage. Reverend Karstedt informed the Chairman of the Administrative Board of the settlement offer, and the two of them felt that they had no desire to compromise the claim as a matter of principle; they rejected the Respondent's request conveyed by Reverend Schenck to take the matter before the Administrative Board.

62. An eleven day trial to a jury of the will contest ensued with Respondent acting both as party and as co-counsel with Mrs. Briggs acting as lead counsel for plaintiffs. After eight hours of jury deliberation a verdict against Respondent was returned; effectively upholding the 1977 will. Judge Justice has indicated that hebelieves the issues presented provided a fair jury question and that he believes he would not have set

aside a verdict for plaintiffs had that been the decision.

II
CONCLUSIONS OF LAW UPON
VERIFIED COMPLAINT

Upon the issues here presented, this Officer concludes as follows:

63. That all findings herein are made based upon a "clear and convincing" standard of evidence; as to issues raised by Respondent as affirmative defenses, findings thereon are also based upon the Commission overcoming the defense by "clear and convincing" evidence.

64. That Canons 6 and 37 of the Canons of Profession Ethics of the American Bar Association, the prevailing ethical standard in Indiana in 1970, provided:

6. Adverse Influences and Conflicting Interests

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelityand not to divulge his secrets or confidences forbidsalso the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

37. Confidence of a Client

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees, and neither of them should accept employment which involves or may involved the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though thereare other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new

client.

> If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

that these standards are stated with sufficient (sic) precision to be understood and to bar certain kinds of activity; and that these Canons evidence proper standards of conduct for the legal profession and are the appropriate vehicle for enforcement of violations before March 8, 1971. See In the Matter of Daniel L. Kuzman (1975) 335 N.E. 2d 210 at 212.

65. That by drafting the 1970 will of Mary Bernice Smoker and advising her thereon, not being a natural ofject of her bounty, when (a) he was a beneficiary under the will, (b) his minor-age son was a most substantial beneficiary of an educational trust created by the will, and

(c) he investigated the tax ramifications of the inclusion of his son, by name, in the trust with an interest in the results of such investigation and gave legal advice to his client thereon, he committed acts which were conflicts of a client's interest with his personal interest; that because of such conflict he would have known that he was exposing the estate of his client to risk of litigation.

66. That even though he was the drafter of the document in violation of the Canons, Respondent did not forfeit his right of access to the Courts to protect his own interest; he had probable cause to believe he could succeed in litigation to set aside the 1977 will and for enforcement of the 1970 will. His determination to proceed was, as a litigant, supportable under the appropriate criteria; it was his misconduct in preparing the 1970 ducument that is the objectionable element to his

act.

67. Upon the suggestion of miscon duct in Respondent or family members bring named as Personal Representative or Trustee in the 1970 will, this Officer is mindful of the distinction in EC 5-5 and EC 5-6:

EC 5-5

A lawyer should not suggest to his cvlient that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, bue before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

EC 5-6

A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

In preparing the 1970 Will, no exceptional circumstances were made to appear. On the other hand, no appearance of impropriety is shown where the management and beneficiary scheme is clearly that of the client and was not shown to be obtained by influence; there the Respondent being a named personal representative or attorney for a trustee, if that were his only involvement in the dispositive scheme, is not an apparent violation.

68. Exceptional circumstances did not exist for the creation of the lifetime services contract and $9,000.00 joint certificate for the Respondent either. He did appropriately urge her to contact other counsel, but she did not; if he believed her health was failing and signing the documents was urgent, then that might be considered special circumstances. Respondent has steadfastly believed, however, that she was competent and that

there was no urgency in the November 9, 1976, meeting, a position he espoused while seeking to have the contract enforced; accepting that, he should not have participated in the creation of those documents.

69. That the evidence as discussed reflects harrassment of his client by his acts knowing them to increase her aggravation and frustration with the guardianship.

70. That he unreasonably delayed termination, acting both in his capacity as guardian and as the attorney for the guardianship, for purposes of his own self-interest and, as he perceived it, self-protection, and to the great emotional cost and to the financial cost to his client.

71. That he improperly communicated a settlement offer to another, knowing them to be represented by counsel.

III: FINDINGS UPON PROCEDURAL AND CONSTITUTIONAL ISSUES

The Respondent has challenged the procedures of the Indiana Supreme Court Disciplinary Commission generally and as applied to this case as violating his constitutional rights. These issues have been developed as follows:

A. Did the delay in bringing this matter to hearing deprive the Respondent of his fair opportunity to defend himself? This has been presented as (a) depriving him of the effective assistance of counsel (b) because of the death of numerous witnesses depriving him of the effective use of the subpoena power and (c) the generally recognized prejudice attached to delay arising from faded memories, lost evidence, living with the uncertainty of the result, etc.

B. Was the Respondent denied equal protection of the law in that he was selectively prosecuted while other malfeasors herein were not?

C. Was the Respondent denied due process and the equal protection of the laws by having his fact-finding hearing joined to the fact-finding hearing in 783-S-262 wherein the Respondent was his law partner and his wife.

D. Was the entire proceeding conducted to deny him the protection of procedural due process of law; stated another way, are the Rules of Procedure for these proceedings as outlined in Admission and Discipline Rule 23 fundamentally fair?

E. Are the nature of the proceedings together with the potential sanctions a cruel and unusual punishment?

Upon such issues the Court now makes the following finds of fact:

72.The Disciplinary Commission received a complaint letter from Attorney R. Adrian Marks on July 8, 1977, followed by the submission of a grievance dated July 20 and received July 22, 1977, signed by Mary Bernice Smoker, attorney Samuel Power and Marks alleging professional misconduct by the Respondent William J. Briggs.

73. Sheldon Breskow, Executing Secretary of the Indiana Supreme Court Disciplinary Commission reviewed the grievance and determined that it contained a basis for further investigation to determine if misconduct by Respondent had occurred; Breskow set in motion further investigatory procedures within the Disciplinary Commission which included notification to the Respondent that an investigation was under way, the issues of

the investigation, and invited by them any response that they wished to provide concerning the investigation; in fact they did present one response which would be considered theequivalent of a general denial in regular pleading practice; the executive
secretary's staff replied that that was not the kind of respose that they were seeking but they were instead allowing the opportunity to provide a factual response as to whether any cause should be commenced; the
respondent did in fact provide a substantial response including submission of vast amounts of material on December 5, 1977.

74. This procedure is the standard procedure by which grievances are filed and the Exceutive Secretary

commences an investigation towards a filing; aside from the general denial nature of the Respondent's initial resonse (sic) and the request for a further filing, Mr. Breskow has no specific recollection of any procedural irregularities in the initial stages of this cause.

75. The grievance together with results of further investigation and the response of the Respondent was presented to the Disciplinary Commission and, as is the normal practice, was assigned to two members for specific review and report, the two members in this cause being Commission members Jeannie Miller and G. Daniel Kelley, Jr.

76. That be vote of the Commission on July 14, 1978, the filing of a disciplinary action against Respondent,

William /briggs was decided and was actually filed before the Supreme Court of Indiana on October 24, 1978. The case was assigned to Commission attorney David Coppenhave, then in his first year of practice. Attorney Coppenhave left the employ of the Commission within a few months and the case was reassigned to Commission attorney David Hughes.

Respondent obtained the services of Delphi attorney Thomas Ives to represent him in this matter; Ives was representing Respondent through the time of Mary Bernice Smoker's evidentiary deposition taken in November, 1977 (Respondent has complained that although Ives had ample notice of that deposition, he and Mrs. Briggs had less than 24 hour notice of it); as the proceeding developed it became clear that an attorney located in Indianapolis would be better placed to

pursue this cause and Respondent therefore hired Attorney James Stewart to represent him. Stewart, togehter with his law partner Richard Gilliom thereafter represented him until Stewart's death in June, 1983. Some months thereafter, Gilliom also withdrew from the representation. Attorney Rakestraw appeared with Respondent at the November, 1983, pre-trial hearing but did not formally appear for him until shortly before trial commenced. No other attorney ever appeared on behalf of Mrs. Briggs although one, Mary Beth Ra,mey, obviously gave it serious consideration and a trial delay was granted from April 22, 1984 to July 12, 1984 so that she would be able to participate if it could be arranged. Mrs. Briggs eventually represented herself.

77. As to the issue of delay in resolvingthis matter, the following appears pertinent: (a) On October 30, 1978, Judge Harold Staffeldt was appointed as Hearing Officer in this matter and he duly qualified on November 10, 1978. He did not act on his own to schedule the matter for either pre-trial conference for for trial setting. (b) Attorney Hughes expressed to Sheldon Breskow concern over the failure of Hearing Officer to schedule such matter for hearing; they were aware of the trial of the Pinto" case before Judge Staffeldt and the vast drain on time that the trial was causing him; Attorney Hughes wrote letters to Judge Staffeldt requesting pre-trial conference dates on August 6, 1980, and again on September 30, 1980.

Correspondence between Attorneys Stewart and Hughes indicates that informally they

had agreed to await the results of the pending litigation before proceeding to trial in this cause.(c) Attorney Hughes continued his concern that the cause would not move forward and suggested that the Commission attempt to obtain a new hearing officer, an operation he characterized as "delicate"; in fact no formal procedure for the removal of a hearing officer exists; accordingly Sheldon Breskow contacted the Supreme Court Ad,ministrator, Bruce Kotzan, concerning the failure of the Hearing Officer and to seek to either obtain a pre-trial conference date or the Hearing Officer's removal; his only notification from the Supreme Court Administrator was that the matter would be taken care of.

(d) As noted in the preceding findings the guardianship trial lasted for approximately 30 trial days between December 3, 1979 and August 7, 1980;

Judge Munro entered his determination of that cause on November 5, 1980, shortly thereafter the parties commenced the will contest trial which resulted in a verdict against Respondent on December 9, 1980. (e) Subsequently, Hearing Officer Staffeldt became seriously ill and was not able to perform judicial or Hearing Officer's functions and following a period of health decline died in the fall of 1981. At the time of his death h he had not been relieved of his duties in this cause. (f) In the interim, a volu,minous mnew set of grievances were filed against Respondent and his wife and law partner Florence Anne Briggs, based upon their actions in the guardianship and the will contest trials; these were filed on April 9, 1981 by Attorney Marks and other participants in those trials. The grievance document was approximately 100 pages in length. Respondent was notified

on May 19, 1981 that the matter was again being assigned to Attorney Hughes for investigation. It elicited a response from Respondent andMrs. Briggs of approximately two volumes.

(g) The Supreme Court of Indiana appointed the Honorable Thomas Wright as Hearing Officer in this cause on November 30, 1981. Thereafter Respondent made a timely objection thereto so that Judge Wright, the lucky dog, was removed from the cause. The Supreme Court then appointed this Officer, who qualified herein on February 24, 1982. (h) The investigation was complated for re-review by the Commission and was again assigned to members Jeannie Miller and G. Daniel Kelley. Respondent, with Mrs. Briggs requested the opportunity to appear before the full Commission before any formal action was taken upon the new grievances so that the Commission minutes of June 11,

1982 reads as follows:

The matter of the request to appear by Richard L. Gilliom and William J. and Florence Anne Briggs in the matter of R. Alan Brubaker, R. Adrian Marks, Charles R. Vaughan, Samuel H. Power, Max Layden and James Huffer v. William J. Briggs and Florence Anne Briggs was then considered. It was the consensus of the Commission that Mr. Gilliom and Mr. and Mrs. Briggs be allowed to appear for 15 minutes.

Respondent was never informed of this opportunity, learning of it only during the evidence presentation in his case. The matter came up at each of the next three monthly meetings:

July 9, 1982

The matter of the request to appear by William J. and Florence Anne Briggs at the August meeting in the matter of R. Alan Brubaker, R. ADrian Marks, Charles R. Vaughan, Samuel H. Power, Max Layden and James Huffer v. William J. Briggs and Florence Anne Briggs was then considered. It was moved, seconded, and unanimously passed that the request to appear by William J. and Florence Anne Briggs be denied and that the matter be considered at the August meeting.

August 13, 1982

The matter of R. Alan Brubaker, R. Adrian Marks, Charles R. Vaughan, Samuel H. Power, Max Layden and James Huffer v. William J. Briggs and Florence Anne Briggs was held over until the September meeting.

September 10, 1982

The first item on the agenda was the matter of R. Alan Brubaker, R. Adrian Marks, Charles R. Vaughan, Samuel H. Power, Max Layden and James Huffer v. William J. Briggs and Florence Anne Briggs. The Executive Secretary having reported the results of the investigation and his recommendation to the Commission, and the Comission having considered such report and recommendation, and the Commission having determined there is reasonable cause to believe Respondents are guilty of misconduct which would warrant disciplinary action, it was moved, seconded, and unanimously passed that the Executive Secretary be authorized and directed to file a Verified Complaint against William J. Briggs and Florence Anne Briggs.

This was done by filing of a Verified Amended Complaint for Disciplinary Action against Respondent and a Verified Complaint for Disciplinary Action against Mrs. Briggs, both filings occurring on July 19, 1983.

(i) In the delays occuring up to September 12, 1982, this Officer believes the Disciplinary Commission to be blameless. Delays caused by the earlier

Hearing officer in failing to schedule this matter for conference may hav e been part of the problem; certainly the concern shown by the Commission Attorney refklects appropppriate diligence in seeking moving this matter forward. Much more importantly, however, the fact pattern had not yhet played itself out. The trials that were held during 1980 were an integral part of the allegations and bore the distinct possibility in assisting in resolving issues in this case. It is also abundantly clear that working on this cause through further discovery or even a trial while the trials in Delphi were occurring would most certainly have led to a most confusing interrelationship of the cases for the participants and would have greatly burdened their time. The solution reach, mutually awaiting trial results, was eminently more reasonable than proceeding; this observation must be

tempered with the notation that Commission counsel did apparently conclude (in retrospect, correctl.y) that the Respondent could seek his remedies and the cause in Delphi proceed to conclusion without the necessity or desirability of Commission intervention, a determination that is probably similar to not seeking suspension pending prosecuting in that no urgency for intervention was made to appear.

The policy of the Disciplinary Commission, as testified to by Sheldon Breskow, upon the filing of a second grievance against an individual is that if the first grievance is nearly at trial date so that the trial thereof is imminent, the procedure upon the second grievance would be conducted independently and the trial of the first grievance would proceed; where however, the trial of the

initial grievance is not imminent it is the policy of the Commission to combine the grievances into a single cause and to proceed to a single trial. The wisdom of that policy is obvious here. The matters here under consideration are not of a divergent nature, arising from numerous clients or concerning numerous legal problems. Here the cause arises from the estate planning of Mary Bernice Smoker, the complexities caused thereby and the method of their ultimate resolution. A matter such as this should be tried in one forum, not piecemeal with 1070 incidents, 1977 incidents and 1979 trial determinations all being separately considered in separate forums. The Respondent has complained of the severe burdens this proceedings has caused him; multiple fact-finding hearings could only make that burden more severe. For the Hearing Officer and the participants,

subse quent hearings which had to take account of earlier results would be unduly restricted and the eharing upon the allegation that the entire course of conduct was inappropriatewould have to be duplicate much evidence from earlier hearings. Continuance to incorporate all grievances together was clearly proper.

Finally, Respondent correctly notes that the formal record of this cause shows no effort by the Disciplinary Commission to move this case forward; in view of the findings in this paragraph of actual efforts not appearing on the docket record, such a deter,mination is of no significance. He further correctly notes that he has no record of continuance request and that the continuance granted in the companion case at Mrs. Briggs' request in April, 1984 delaying the commencement of this action by three months, was over his objection. The

Commission correctly notes that he made no request for an expedited hearing and that by counsel he in fact agreed to a delay through the 1980 trials. The Disciplinary Commission again, as testified to by Sheldon Breskow, has adopted the position that the commission has a duty to seek a prompt resolution of disciplinary cases because of the "chilling" effect a pending complaint has upon a petitioner, but that a respondent's duty to assure prompt trial is akin to a defendant's duty in a civil case; while parenthetically indicating that he believes this position reasonable, your Hearing Officer also indicates that its determination herein is not based upon any decision that that standard applies.

(j) From September 10, 1982, the date of approval of further proceedings by the Commission to July 19, 1982, the date of the Amended Complaint was filed delays attributable to the Commission occurred,

all directly related to the individual work load and circumstances of commission trial attorney David Hughes. Specifically contributing to the delay in his preparation of complaints were the following (1) major surgery for his wife in September, 1982 coupled with his prosecution of a major civil case which led to his exhaustion and placement under doctor's care in November, 1982. (2) necessity of his filing in January,1983 of theDisciplinary Commission appeal applying to respondent Zarko Sekerez, (3) a succession of other trials and civil matters, (4) the complex nature of this complaint in this cause.

This Officer is sympathetic to difficulies arisingfrom the sheer volume of the case. Other workload, however, raises a new policy consideration of the Commission upon which no direct evidence

was submitted. The staffing of a disciplinary executive branch can be undertaken in at least three ways: (1) the employment of a full-time, in house staff for all trial preparation and trial proceedings as well as presentations to the Commission, (2) the hiring of such staff on a case-by-case basis on what is essentially an independent contractor basis, or (3) some combination of theses using either part-time staff or some staff members of each origin. I nherent in choices (2) or (3) is that busy trial counsel will have conflicting trial settings and that certain incidental delays caused by a busy trial schedule will occur. The Commission has opted for course of action (3) with aomw trial staff being full time salaried employees and others being part-time; Hughes is part-time. This Officer cannot accept the notion that incidental delays cause

constitutional infirmity. By choosing course (3) the Commission has assured that it will have available experienced trial counsel, involved in the daily practice of law and therfore more attuned to the concerns, choices and difficulties of practice than would be any salaried full-time staff. This staffing method is certainly reasonable and, in the opinion of this Officer, is the best choice. The ten month delay in filing in this particular circumstance is appropriately characterized as incidenta. Hughes has provided adequate explanation of his activitires during this time period so as to show diligent pursuit of refiling. Particularly in view of the complexity and voluminour record of the cause, Commission re-assignment to a less burdened staff member should have been and apparently was, a last resort.

(k) That in July 1983 the new complaint

against this Respondent was filed as was the complaint against co-respondent Florence Anne Briggs. This Hearing Officer had previously been appointed to hear Respondent's matter and had qualified on March 10, 1982. He subsequently was named Hearing Officer in Mrs. Briggs' matter on September 12, 1983 and qualified on September 21, 1983. Mrs. Briggs moves for a change of hearing officer immediately, citing as cause that the same Officer was appointed in this case. The Disciplinary Commission by Attorney Hughes opposed change and the Supreme Court of Indiana denied a change on October 6, 1983.

(1) Pre-trial conference was scheduled for November 3, 1983, but at such conference Mrs. Briggs correctly noted that notice of pre-trial had not been entered in this cause; Attorney Hughes

indicated he had believed pre-trial conference was for both cases and came prepared accordingly; mrs. Briggs indicated she was not prepared for pre-trial conference in her case which was then rescheduled for and held on December 16, 1983.

At both pre-trials, the joinder or bifurcation of the trials was debated; this Officer ordered the trials joined for fact-finding hearing, but directed:

> "All pre-trial proceedings however including preparation of witness and exhibit lists, pre-trial motions, and the Court's ultimate findings and conclusions herein shall be separately made, with only the actual evidence presentation to be combined.

A timetable for witness and exhibit lists was established, and upon representation that trial would take two to four weeks,

trial was scheduled for April 24, 1984.

(m) Mrs. Briggs had moved to allow Mr. Briggs to enter his appearance for her, a request that was eventually denied. On March 19, 1984, Mrs. Briggs moved for continuance of the trial date to allow Mary Beth Ramey to appear for her in this matter; Respondent in this cause opposed continuance; the continuance was granted and trial was rescheduled for July 12, 1984. At trial, she represented herself.

(n) That on June 25, 1984, Respondent William Briggs, having applied for and obtaining the right to use the pseudonym "Anonymous", filed a complaint for injunctive relief in the United States District Court for the Northern District of Indiana Hammond Division naming as defendants in the cause the Indiana Disciplinary Commission, Sheldon Breskow, Executive Secretary, David Hughes, trial

attorney for the Disciplinary Commission, and the Supreme Court of Indiana; that Respondent notified this Hearing Officer of this filing in that cause but that this Hearing Officer was not made a party thereto; that as a result of such filing Judge Kanne of the Northern District of Indiana stayed proceedings in this court to determine the result of the case in the State's court to allow the State Court to make their determination of the constitutionality of the proceeding.

(o) From all appearances, preservation of evidence in this matter was far easier than it might have been in a different type of case. The relationships of the parties while various documents were created, the contents of the documents and the pleadings and evidence submitted in the Court struggle make this case one where the record of events is, by its very nature, well preserved. Respondent was put

on notice early that this action would result so he had ample opportunity to recall and preserve as much as necessary. As noted before, amazingly little of this matter has contested factual issues; virtually all such contested issues center around the "harrassment" allegations.

(o) Trial of this cause commenced July 12, 1984 and continued with occasional days for recess for all or part of 15 trial days, final argument was heard herein on August 30, 1984 and the parties waived the 30 day reporting requirement for the hearing officer.

78. That at trial Florence Anne Briggs sought to enter her appearance on behalf of Respondent. He consented to such effort; in view of the possibility of conflict in the positions of the parties, the Hearing Officer did not allow the filing of such appearance, particularly where William Briggs was already

represented by trial counsel Rakestraw; in fact, in representing her own interests Mrs. Briggs conducted much inquiry of a very limited relevance to her own defense but of substantial relevance to William Briggs' defense; the Court also allowed Mrs. Briggs, respondent William Briggs, and attorney Rakestraw to freely consult together throughout the trial of the cause for purposes of submission of any question to witnesses or for other trial purposes.

79. Respondent has objected to this cause being joined for trial with that of Mrs. Briggs. He first suggested that such a joint hearing was unheard of and was being undertaken only because he and the co-respondent are husband and wife. The response was made and supported however that other attorneys have been tried in jointly held disciplinary proceedings where the actions arose from a common underlying fact pattern. Other argument

bases its precedent upon criminal matters.

The Supreme Court obviously made a conscious choice to appoint the same hearing officer in both cases to provide the option of a joint trial. In point of fact the underlying fact pattern involving the estate planning, guardianship, and estate of Kate Smoker is common to both cases although the alleged acts of misconduct of each attorney are distinct. The determination by this Officer for joinder of these causes for evidence presentation and that preliminary matters and motions and ultimate findings and conclusions should be separately made all attempt to recognize this difference. Further, no record of injury to the cause of the Respondent appears of record. Respondent and co-respondent indicated at two or three different stages of trial that they had held spirited discussions as to their appropriate course of action and

that they were not in agreement as to what it should be. The only specific evidence on the topic was that one of them wanted to call two witnesses, the other one didn't and that they eventually called one of them; the witnesses involved and the issue were not identified. They refrained from presenting a record in any form about those different choices or their possible significance. No showing of constitutional infirmity or of due process violations was made.

80. As part of the pre-trial proceedings in this case the Respondent filed a discovery motion which was a clear parallel to a "Brady" motion in criminal law; he asked for all evidence that the Commission might have which was favorable to him. This Officer did not accept the "quasi-criminal" argument of Respondent on this issue and, accordingly denied it to the extent that it exceeded other

discovery already undertaken. The Commission, by attorney Hughes, provided a response anyhow, indicating that of evidence favorable to Respondent, it was all equally available to, and in fact known by, the Respondent.

81. Because of the passage of time the Respondent has objected because of teh death of numerous witnesses that he was unable to receive a fair trial. As noted in earlier sections, evidence in this cause was not substantially in conflict. Only a few areas of evidentiary conflict arose. It is doubtful that evidence of any of these witnesses could have been other than cumulative.

An exception to this rule would in fact have been the testimony of Mary Bernice Smoker. However, as the central client figure in what was essentially a guardianship, will and estate contest, it is difficult to imagine a method for doing

more to preserve her testimony than was here undertaken.

Virtually the only other witness who was referred to often during the testimony as a person who could have provided helpful testimony was the Respondent's former secretary Bertha Wolfe, now retired and residing in Arizona. Respondent indicated that she was ill but did not explain the extent of her illness that apparently led to her absence. The Respondent left the impression that her testimony would have been uniformly favorable about the Respondent's character and professional capacity, but that it would have not addressed with first-hand knowledge the "lock box key" incident, the "fish story", the Brubaker telephone conversation or those few other areas in evidentiary conflict.

82. In a related argument, Respondent suggest that he was denied a fair trial

because, in the delay he was deprived of the attorney of his choice by the death of Attorney James Stewart.

It was also argued that he was deprived of due process by the delay in that the originally appointed Hearing Officer, Harold Staffeldt, had died and the case had to be heard by somebody else.

This Officer believes such arguments to be without merit. The providing of fundamental fairness in these proceedings is not indelibly attached to the participation of any one individual. The availability of due process must arise from the nature of the proceeding.

83. The Respondent has argued throughout this matter that other attorney participants through this cause, particularly R. Adrian Marks in his discussions with Mary Bernice Smoker at a time she was under guardianship and before notice of such discussions was provided to

the guardian William Briggs, particularly Alan Brubaker in leaving a business card with Mary Bernice Smoker at the hospital, and particularly James Huffer or Charles Vaughn in representing clients of divergent interest, should have been investigated by the Commission.

The Executive Secretary of the Commission Sheldon Breskow, described the circumstances by which he commences an investigation; simply stated an investigation commences with a grievance being filed and further investigation follows thereafter; only in rare occasions of blatant violation does the Commission initiate a grievance or investigation procedure on its own.

The evidence in this cause reflects that no grievance was ever filed against any attorney participant in this action except the attorneys Briggs; it is observation of this Hearing Officer that

acts which may have been acts of misconduct were described in the evidence of this cause but that no acts were as significant and of such serious nature as those committed by the Respondent and as found by this Officer.

84. Respondent objected to being required to testify in the belief that it violated his 5th amendment right to remain silent; before allowing the Commission to call Respondent as a witness, the Hearing Officer required that the Commission had made a case sufficient to withstand a motion to dismiss prior to the testimony of the Respondent; a comparable determination of corpus delicti in a criminal proceedings was consciously followed in order to assure that the proceeding retained an accusatorial character and not an inquistitorial one.

Respondent also objected to the use of Mrs. Briggs' testimony as a witness for

the Commission in view of the long-time evidentiary rules concerning spousal testimony; Indiana's statute concerning the subject is I.C. 34-1-14-5:

> The following persons shall not be competent witnesses:
> 6. Husband and wife, as to communications made to each other.

This has never been enforced as a competency statute but is instead a privilege statute; it has impact as to communications only, not acts. Therefore, the general objection that was made to her testimony could never be applicable. If any objection were ever appropriate, it could only be upon questions relating to marital communications.

In fact, this Officer believes all of the testimony proper and admissible on at least three separate theories. First, the Respondent and co-respondent both voluntarily testified as witnesses; while the preservation of a record of objection

to testifying is not at present available to this Officer, their voluntary testimony on virtually all areas of the case must have served as a waiver. Second, a proper remedy would be to limit the consideration of the testimony given as part of the Commission's case in chief as against that individual only, not as to the other; in all candor, it is impossible to always provide the source of much of the background information, so that parts of it may have been considered on the factual settings, but none was determinative on any of the acts of misconduct. Third, but by far most significant is the Officer's belief that any such testimony should not be barred anyhow. The activities here under consideration were the acts of professional partners, consulting together about professional matters, not about matters of marital concern. Such business matters, ostensibly being performed on

behalf of a third person should not be hidden from scrutiny by this particular rule. The sole exception to all of the evidence presented which could be considered as a private marital communication would be the setting at home described by both Respondent and co-respondent leading to the telephone conversation with Kate Smoker that is here called the "fish story". This testimony was provided voluntarily.

85. In his attempt to exercise his subpoena rights in this cause, the Respondent served with subpoenas to appear and testify, among other people, the Disciplinary Commission members. Upon Motion to Quash these subpoenas, this Hearing Officer conditionally granted the Motion to Quash and indicated that it would not enforce such subpoenas without some showing by Respondent that the members ahd first hand knowledge of some

fact at issue. Respondent indicated that the chief purpose of inquiry would be to inquire amongst the members why they did seek prosecutions against the other attorney participants here. It is not difficult to further believe a purpose to have included inquiry into the considerations that went into their decision to file the complaint and amended complaint herein and to make particular inquiry of G. Daniel Kelley and Jeannie Miller as to the nature of their recommendation to the other Commission members. These subpoenas were not enforced.

86. Similarly the Hearing Officer did not allow the presentation of evidence of the discussions at the Commission meetings as to what factors the members may have been relying upon in determining to proceed or to have required attorney Hughes or attorney Breskow to produce their

materials or recommendations which would qualify as attorney work product.

87. Aside from these proceedings, Respondent knows none of the Commission members. There is no suggestion that the Commission or this Hearing Officer are anything other than independent.

88. That co-respondent Florence Anne Briggs provided testimony that this period of time was the most stressful of these respondents' married life together, that because of the pressures caused by the pendency of this cause that they have come near to a dissolution of marriage, that Respondent here has become more withdrawn from his friends, has withdrawn as County Chairman of the Carroll County Democratic Party at a time when co-respondent had run for public office as Circuit Court Judge or as Prosecutor and narrowly losing on each occasion with the possibility of running again. She further indicated that

the parties have had severe economic loss because of this filing including loss of business, a terrific loss of income including greatly reduced income during the period of this trial and have had a change in their living pattern resulting in fewer vacations during this period of time. Their son, Winston who is attending law school, possible chose an out of state school because of this proceeding. Additional testimony was provided that cases have been turned down, that there has been a loss of self confidence by the respondents, that they have had more quarrels during the period of time that this has occurred and that having this case pending has led to some restraint on their liberty in the way of limiting their freedom to travel at certain times. Evidence as to extensive costs and fees in this case was also received indicating payment by Respondent of approximately

$25,000.00 in defense fees without computing this present attorney's (Rakestraw's) fees for the trial.

89. At the pre-trial conference of November 3, 1983 at Fulton Circuit Court, this Hearing Officer directed a meeting outside the Officer's presence for the parties to discuss possible simplifications of issues and evidence presentation, and to consider any possible resolution of the cause; this Officer believes such a meeting appropriate in the spirit of Rule 23, Sec. 14 (c), Sec. 11 (d), and Sec. 17. Attorney Hughes objected to Mrs. Briggs participation in such a meeting because of what he perceived to be her tendency to quote as fact statements out of context made by opposing counsel. Evidence of constitutional infirmity was in fact presented at trial challenging the fundamental fairness of these proceedings

alleging that Attorney Hughes (a) attempted to scare these respondents with stories of Owen Crumpacker, a disbarred attorney whose case David Hughes tried for the Commission, (b) offered to resolve these two cases together with a (apparently unacceptable) package offer, but would not discuss them separately and (c) suggested to Mrs. Briggs that she change her name. No contest for these comments is shown. Evidence from the other participants in the conference indicate that Rakestraw and Hughes did have a brief discussion about Crumpacker's present circumstances, that mention was made as to what a proper law office name would be if one of these two respondent's received disciplinary suspension for a time, and that a free-wheeling discussion on possible agreed resolutions or consent findings was held. This Officer finds no error in such conduct and, in fact,

believes it to be the kind of meeting anticipated. If, for some reason, this is erroneous, there has been no showing of prejudice flowing to Respondent because of such an error.

IV

CONCLUSIONS OF LAW

UPON CONSTITUTIONAL ISSUES

Upon the issues raised as constitutional or procedural matters, this Officer now concludes as follows:

90. That the term of years in bringing this matter to hearing did not unconstitutionally burden the Respondent. As previously noted, the 1977 filing served to notify him that matters were under consideration, but any resolution before the trials would be premature. Thereafter the only delay was not substantial in view of the scope of the materials and issues in the litigation. While the death of witnesses and of an attorney selected by Respondent did occur during this period, these appear to have not significantly effected the Respondent's cause. Finally, delay in this cause was not the product of the

Commission or its Attorneys; they have acted with such appropriate dispatch as the unusual circumstances of this case have allowed.

91. There is no idication of selective prosecution. The procedural method by which this Respondent was selected for prosecution and other participants were not was well explained; it is a neutral method, reasonably well suited to the efficient administration of attorney discipline.

92. Joinder of causes for trial with co-respondent Florence Anne Briggs was not made to appear to have caused any prejudice to the case; it does appear to have been the most efficient fact-finding method for all participants.

93. Proceedings before the Disciplinary Commission and in their prosecution of this cause are fundamentally fair in that all necessary elements to due process are

provided for; specifically the Commission acts (1) as an independent Prosecutor acting without fear or favor amongst the bar that it administered, (2) that proceedings when contested are presented before an independent tribunal, (3) based upon specific allegations upon stated professional standards, (4) based upon an independent preliminary investigation in which Respondent had the right and opportunity to participate and reply being aware of the specific charges; and that in the contested proceeding, (5) the Respondent had for his benefit an enforceable subpoena power to present his witnesses, (6) that he had the right to confrontation and cross examination of the witnesses against him, (7) that he had the right to the counsel of his choice, (8) that the trial was presented in due course and in as reasonably prompt fashion as the special circumstances of this cause would

allow, (9) where the Commission in an accusatorial proceeding (10) had the burden of proof by a "clear and convincing" evidentiary standard and where (11) a complete right to review and appeal is available.

94. In his case, the Rules of Procedure were applied so as to afford Respondent due process.

(Certainly these rules aren't perfect, although they seem to have the flexibility to ultimately accomplish necessary ends. In particular, shortcomings which became visible in this case were: (1) the previously noted lack of a formal removal method for a non-acting or ailing Hearing Officer; (2) the rules limiting preliminary or dilatory proceedings make fact-finding hearings with constitutional or procedural issues to preserve a bit unwieldy. Upon misreading In the matter of Zarko Sekerez (1984) 458 N.E. 2d 229,

this Officer felt that he could not separate substantive and matters into two such hearings although, at this juncture, it would appear that an Officer does and should have such opportunity within his sound discretion; and (3) our present reporting methods of publishing only those cases where misconduct is determined make citations of Indiana authority for either substantive or procedural matters favoring respondents extremely rare; no balancing determination of proper activity by counsel in difficult areas of the law are printed so that Respondent ends up resorting to other jurisdictions for authority. In the long term, this may create an inbalance, inviting federal interference on due process grounds; indentifying the problem is different from addressing it however as no one appropriate method for dealing with it appears. Written dissents, publication of

Commission losses, or opinions of mixed findings of both proper and improper conduct are the most obvious solutions, although each has drawbacks.)

95. Respondent's argument that in some fashion his treatment in this cause equals cruel and unusual punishment is without meaning to this Hearing Officer. While this Officer is aware of the difficulty caused the Respondent by the pendency of these proceedings, this Officer is not aware of how this could be construed as a violation of any Eighth Amendment right. Accordingly, no determination of violation of an Eighth Amendment Right is here made.

96. Numerous other allegations of procedural or constitutional irregularities were made. This Officer has sought to address those of colorable merit; should any other issues appear requiring further findings or conclusions, or should any major issue have been here

overlooked, this Officer will, upon request, seek to address it.

V.

ULTIMATE FINDINGS AND CONCLUSIONS

Now therefore, upon the preceding findings and conclusions this Officer now determines:

97. That Respondent by drafting the 1970 Will and advising his client thereon when his son was a substantial beneficiary of a Trust created by said instrument violated Canon 6 of the Canons of Professional Ethics in that his professional judgment on behalf of his client may reasonably have been affected by his own financial business, property, or personal interest and to such a degree as to impair his independent professional judgment.

98. That as to allegations that by drafting the 1970 Will and advising his client thereon when he was a beneficiary under the said Will, that his law firm was to be the attorney for the Estate and for said Trust created in the Will, and when

his wife and law partner was to be a representative of the Estate, Respondent is not shown to have so violated the Disciplinary Rules or Ethical Considerations as to justify sanction.

99. That by preparing a Will and Trust document wherein his family were substantial beneficiaries and with full knowledge of the status of Indiana law applying thereto, Respondent invited a future Will contest and thereby intentionally failed to seek the lawful and appropriate objective of his client in violation of Canon 6 and Canon 37 of the Canons of Professional Ethics.

100. That the Court finds that the Respondent did violate the Code of Professional Responsibility in the execution of a joint certificate of deposit in conjunction with the life-time services contract in violation of D.R. 5-101 when its creation was clearly for

testamentary purposes and he did not believe exceptional circumstances to exist requiring his participation in its creation.

101. That by harassment of his client the Respondent did violate D.R. 1-102 (A) (6) by engaging in conduct which adversely reflected upon his fitness to practice law.

102. That by unreasonably delaying the termination of his client's conservatorship and in particular by unreasonably delaying the restoration of control over her personal and real property assets to her, Respondent violated D.R. 5-101 (A) of the Code of Professional Responsibility by allowing his personal judgment on behalf of his client to be effected by his own personal interest, such conduct also constituting violations of D.R. 1-102 (A) (5) and (6).

103. That evidence of the Respondent

seeking to collect an illegal or clearly excessive fee was not sufficient to show any violation of the Code of Professional Responsibility.

104. That evidence presented upon the allegations that the Will contest cause was filed in bad faith was not sufficient to show by a clear and convincing evidence standard that he violated the Code of Professional Responsibility.

105. That by failing to communicate a settlement offer through the attorney of record and instead attempting to communicate such offer through another, the Respondent did cause another to communicate on the subject of the representation with a party he knew to be represented by a lawyer in violation of D.R. 7-104 (A) (1) of the Code of Professional Responsibility.

106. That as to Respondent's entire course of conduct, while it is clear that

he should have required that another attorney draft the Will of his client his course of conduct until such time as his client sought other counsel without his knowledge was otherwise appropriate, but that thereafter his conduct fell short of proper professional conduct as described in the Code of Professional Responsibility and as set out above; that such failures are described individually in the paragraphs above and that this Hearing Officer does not believe that a further determination of misconduct to intentionally damage his former client and ward is warranted and therefore makes no finding of violation thereon.

107. That the procedures of the Disciplinary Commission of the Supreme Court of Indiana and in particular the activities pursuant to those procedures by the Disciplinary Commission in this case were proper and appropriate and meet all

constitutional standards required by the State of Indiana and of the United States and that accordingly, the Respondent's rights in this cause have not been denied him.

## VI.

## RECOMMENDATION

This Officer first notes that Respondent requested that, should a finding against him be made, that a recommendation be made. In making any recommendation or in imposing sanction, the standard to be applied involves consideration of (1) the nature of the violation, (2) the specific acts of the Respondent, (3) the Supreme Court's responsibility to preserve the integrity of the Bar, and the risk, if any, to which the public is subjected by permitting the Respondent to continue in the profession or be reinstated at some future date.

Several initial considerations appear in Respondent's favor. This Officer believes that the fervor of the defense is not because of Respondent's failure to see his professional error, but is instead because of his belief in the erroneous

result of the Smoker litigationand because of his perception of unfairness of the nature of this proceeding and the lack of a similar sanction against other erring participants. Also, his background of years of good service to the Carroll County Bar must be weighed in his favor; while he lost his perspectives in this one matter, he would appear to be a minimal risk to the public.

As to the violations here occurring, the inappropriate communication of settlement offer is more of a technical violation than a breakdown of moral fiber. He was aware of the rule and took steps to act properly, but bungled it although no harm came of the act; under the totality of circumstances at the time including the pendency of disciplinary proceedings this simply reflects bad judgment. The drafting of the Will where his minor son was the greatest single beneficiary is a



Exception 1. Denial of fair trial—meaningful and timely opportunity to be heard—right to present full and adequate defense.

Respondent excepts to the Hearing Officer's Report because he was denied a fair trial(hearing) on the merits, a meaningful opportunity to be heard, and the right to present an adequate defense, all of which is guaranteed by due process of law requirements found in Amendments 5 and 14 of the U. S. Constitution and by Article 1, Sec. 12 of the Indiana Constitution. The fundamental fairness of these proceedings has been skewed through no fault of the Respondent by the indifference, neglect, and unreasonable prolongation of these proceedings for seven years from grievance in July of 1977 and complaint filed in October of 1978 to the amended complaints in 1983 and 1984 and to the trial commencing on July 12, 1984. Not only has Respondent been held in terrorem but he has lost witnesses, lost evidence, lost memory and ability to recall himself and those of his witnesses, lost the first hearing officer by death (he was acquainted with Respondent in his professional duties), lost his long-time attorney who had vast experience as opposing counsel in disciplinary matters with attorney Hughes of the Disciplinary Commission, could as a witness relate what if any alleged or real oral agreements had been made with attorney Hughes and the Commission, could confirm or deny alleged policy or normal or standard procedure of the Commission in this and other cases, and could relate as a witness his interviews with prospective witnesses and in particular Rev. Arthur Schenck, and other harmful circumstances all of which have caused the Respondent irreparable harm.*

*See footnotes Ex. 1-1 et. seq.

more serious problem; here clearly alarm bells should have been sounding to him. He was still carrying out the request of his client, but he had lost his independent perspective and any advice on the subject was immediately tinged with self-interest. Finally, his harsh dealings with his elderly ward during the spring months of 1977, his retention of her property within his control to pursue his own self-interest, and his seeming unconcern about the restoration of her freedom to operate her own business affairs must be viewed as serious misconduct which cannot be tolerated.

This Officer recommends the suspension of the Respondent from the practice of law in Indiana for a period of six months.

Douglas B. Morton

Douglas B. Morton
Hearing Officer

1/18/85

Filed 5/20/85

IN THE SUPREME COURT

OF THE

STATE OF INDIANA

IN THE MATTER OF

WILLIAM J. BRIGGS

CAUSE NO. 1078-S-235

**PETITION FOR REVIEW**
**AS ANNOTATED BY FOOTNOTES**

FILED BY

WILLIAM J. BRIGGS

The Respondent, William J. Driggs, pro se, respectfully s
mits this Petition for Review which is divided as follows:


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PART I

## PRELIMINARY STATEMENT

The undersigned, William J. Briggs, respectfully says that:

1. In making this Petition for Review this Respondent is es pecially mindful and appreciative of the time and effort expended by the Honorable Douglas B. Morton and his attention to many deta in conducting these long and many-faceted proceedings culminating in his Hearing Officer's Report to the Supreme Court of Indiana a filed on Friday, January 18, 1985 with his supplement filed on January 23, 1985.

2. Rule A. D. 23, Sec. 15 (a) required this Respondent to a to make an election as to whether (A) he would file a Petition fo Review or (B) waive such a right--at a time before the Supreme Co of Indiana has informed the Respondent if it intends to follow or regard the Hearing Officer's Report. No other rule of the Indian Rules Admission and Discipline appears to protect the Respondent this dilemna. This leaves the final disposition as to discipline, any, and its nature, completely unknown to the Respondent at the he must act and make such election. Requiring Respondent to elect in advance compels Respondent to elect to file in order to preser constitutionally protected rights or elect not to file and waive protected rights. The chilling of rights by the constitutional di lemna as increased by the apparent disfavor accorded to respondent who make any real defense in a disciplinary matter have all demand serious consideration by Respondent. It is more than an unfortuna situation, because this Respondent considers it of the greatest ur gency to bring to close this matter and all other Smoker-related litigation which have burdened the courts so long and have caused Respondent and his family so much hardship and stress since 1977. However, at this late date with the greatest reluctance Respondent is now required to elect to file this Petition for Review in order not to forfeit constitutionally protected rights.

3. The undersigned respectfully calls to your attention the Respondent heretofore by pleadings filed on or about May 7 (and prior thereto) raised Constitutional issues and errors ar the May 7, 1984 pleading requested that separate hearings on s be held before trial on the merits of the disciplinary complai the Supreme Court of Indiana as well as the Hearing Officer. Requests were denied by both. The pleading and memorandum rai Constitutional issues and errors filed on or about May 7, 1984 now incorporated herein including such of the prayers and requ for relief which have not become moot.

PART II

PRAYER FOR RELIEF

This Respondent petitions the Supreme Court of Indiana to review the Hearing Officer's Report and

A. To accept the Hearing Officer's Report as filed subjec to the exceptions and requested corrections which are set out herein, and

B. To correct his report in accordance with the exceptio and requested corrections set out herein, and

C. To enter an Order determining that there has been a de of constitutionally protected rights necessitating the dismiss this cause against this Respondent, and/or

D. To enter an Order resulting in no discipline or no dis pline in excess of suspension for six (6) months with provisio automatic reinstatement without the necessity of a hearing.

Respondent, William J. Briggs, says under the penalties fo perjury that the matters and facts contained in all parts of th Petition for Review are true.

William J. Briggs Pro Se
Attorney at Law
Box #2, Flora, IN 46929
219-967-3631/3643

Ex. 1-1: A list of witnesses who were not available to testify at the hearing is set out on page 2 of Respondent's pleading MEMORANDUM AND SUPPORTING AFFIDAVITS filed on 5-7-84. An Affidavit relative to each witness who was unavailable was made a part of that memorandum commencing at page 56 which set out proposed testimony. Offers to prove were made or attempted to be made, at Rochester at the trial, (in the transcript, the offers to prove are included at Tr pages 171 through 225.)

Ex. 1-1A: An offer to prove can never adequately provide evidence of what a dead or unavailable witness would say. Respondents have done everything possible to provide lost evidence. "If witnesses die or disappear during a delay, the prejudice is obvious." Scott v. State (1984) Ind.App., 461 N.E.2d 141 at 143 paragraph 4, and "loss of memory, however is not always reflected in the record because what has been forgotten can rarely be shown." Ibid 143, paragraph 4. "If an accused's trial does not begin until years after the crimes, not only may a memory fade, it may be entirely lost, neither of which is susceptible to proof other than a statement to the effect, "I do not remember." Ibid 144. This was vividly brought out by the testimony of Mr. Breskow. See Tr. 380 line 19 through Tr 381 line 3:

"Q Mr. Breskow, do you believe that the passage of time makes the proof of facts more difficult?

A Yes. It sure does in my case.

Q What has been more difficult in your case? What dead witnesses do you have in the Disciplinary case besides Kate Smoker? You took her deposition.

A But, Mrs. Briggs, do you want an answer to that?

Q Yes.

A It's more difficult for me to recall because I've had a lot of intervening transactions between 1977 and now.

Q But you're not conducting this case?

A I am a witness. It is difficult for me to recall as a witness because I have had intervening transactions."

Without fail, nearly every witness indicated that the passage of time had made events more difficult to recall.

Ex. 1-2: Mary Bernice Smoker died in 1979. Her deposition was taken in 11-77. Smoker was the only real party in interest as a grievant. She should have been the chief witness except for delay.

Ex. 1-3: In the 7-83 Amended Complaint in Clause 18 thereof, Respondent is charged with delay in Termination of the Guardianship The delay complained of is alleged to have happened between a perio commencing on 2-77 (when the Petition to Terminate the Guardianship was filed by Briggs) and ending shortly after 5-26-77 which was the date the guardianship was terminated. (See docket sheet Exhibit P-107). The original grievance was filed about 7-8-77. (Tr 232 testimony of Breskow) The Smoker deposition (taken by the Disciplinary Commission) was not taken until about 11-22-77. The entire Smoker deposition is a part of the record of this case. There was no charge of delay in the termination of the guardianship in the original grievance filed on 7-77 or in the new grievance filed on 5-81. There was no charge of delay in the complaint filed on 10-24-78. Since Respondent had no notice (as to the charge of delay) whatever even in a grievance and certainly not in the original complaint filed as late as 1978, the Disciplinary Commission failed to give him due process notice as to this charge of delay. He was given absolute no warning that he would be required to defend against such charge until in the year 1983 when the Amended Complaint was filed. The prejudice is obvious. The Disciplinary Commission made no attempt whatsoever to question Mary Bernice Smoker in her deposition as to the delay, and since William Briggs had no notice that he was being charged delay, he was by the actions of the Disciplinary Commission prevented from having an opportunity to cross-exam Mary Bernice Smoker on this issue which the Disciplinary Commission has claimed is so serious. It is of the upmost importance to note that this issue was not raised by the principle prosecuting witness, Mary Bernice Smoker and was only raised by others after her death.

Ex. 1-4: In addition, the Commission violated its own Rules in this, to-wit: Under R.A.D. 23, Sec. 10(c), it says, "in the event that the Executive Secretary or the Commission should consider any charges of misconduct against any attorney not contained in the grievance, the Executive Secretary shall notify the attorney of the additional charges under consideration, and the attorney shall have the opportunity to make a written response to the additional charges under consideration within 20 days after receipt of such notification." However, neither the Executive Secretary or the Commission ever notified the Respondent at any time that he would be charged with delay such as is found at clause 18 in the 7-19-83 complaint.

R.A.D.23,sec 10(d)part 2 says,"any additional charges...after such notice has been given by the Executive Secretary and the attorney has had an opportunity to reply thereto maybe the subject of a count of any complaint filed against the attorney pursuant to Sections 11 and 12 of this rule." There was complete failure of the giving of the required notice which was required by this secion.

There was also a failure by the Executive Secretary to give notice as is required that the Complaint had been docketed. No such notice was given in 1977 or 1978. This is provided for in Section (B). The notice requirement is stated as follows: "...and the Respondent shall be given written notice of the Executive Secretary's determination." No such notice was given of docketing. This was admitted upon the witness stand by Mr. Sheldon Breskow, the Executive Secretary. See R.A.D.23, Sec.10 (b). (Tr 292, testimony of Breskow. Start line 25 page 292 through line 17 page 293.

Ex. 1-5. Ralph Hanna, an attorney of Delphi, Indiana, died in 3-81. During the spring of 1977, Ralph Hanna was alive and als he was aware of the filing of the Petition to Remove William Brig as guardian. Florence Anne Briggs testified at the hearing in Ro- chester that she had been advised by Ralph Hanna about the proper way to handle the unnecessary and defamatory pleading which had be filed by Adria Marks and Samuel Power (grievants herein). Mr. Ha advised that "strict proof" should be demanded as to the Petition Remove. He could have testified as to this. (Tr 188 offer to prove for Ralph Hanna, testimony of Florence Anne Briggs line 24-28.) It is believed that his testimony would be admissibl under the standard announced in the case of Wong v. Tabor (1981) Ind.App., 422 N.E.2d 1279. The Disciplinary Commission presented no evidence from any competent or reasonable attorney as to whethe the defense as to the Petition to Remove was worthy of litigation. In addition Ralph Hanna could have testified as a long time practi tioner (attorney) in Carroll County as to whether Respondent's Pet tion to Contest the Will of Mary Bernice Smoker was justified or w filed in bad faith. (Tr 188 offer to prove for Ralph Hanna, testimony of Florence Anne Briggs, page 188 line 2 through 6 ). See page 28 of the Petition for Review for the harm done to Respondent's case because it was delayed until after the death of Ralph Hanna.

Ex. 1-6. Loss of testimony and aid at trial of James Stewar was one of the most serious losses for Respondent. The Disciplina Commission by its attorney delayed the filing of the complaint and trial in these proceedings until James Stewart died. (See Tr 176 offer to prove for James Stewart by Florence Anne Briggs, see line through line 17). Then later at the trial, the Commission attempt to prove that Respondent's attorney, Mr. Stewart, had an informal agreement with Mr. Hughes, Attorney for the Commission, agreeing t delay the trial. This delay in filing of the Complaint until Mr. Stewart died set up a fundamental error which could never be elim- inated by the trial of this matter. Testimony of Mr. Stewart whic was lost because of the delay in the trial caused the Respondent a irreparable injury. He was prevented from appearing at the trial and giving testimony as to the alleged oral agreement to delay the trial or to explain letters which the court admitted. (Tr 181 line 8 through 28. Also see numerous letters which were exhibits of the Commission, exhibits 89 through 105.) James Stewart was prevented from testifying as to his extended conversation with Rev- erend Arthur Schenck. (Tr 176 line 1 through 12. See Tr 181 line 17 and on the next page, 1 through 7.) James Stewart was experienced in dealing with the Disciplinary Commission, and would have known about the so-called normal or regular procedure or poli at the Disciplinary Commission. Mr. Hughes testified as to his relationship with James Stewart. (See Tr 426 lines 11 through As to alleged regular procedure or policy at the Disciplinary Comm sion, Mr. James Stewart could have assisted in cross-examining and witnessing from his long experience in Disciplinary cases on these matters. See testimony of Sheldon Breskow as to this so-called no or regular procedure. (Tr 290; 341; 370; 394; 413; and 317

Ex.1-7 Neither the Disciplinary Commission nor any of its attorneys filed any pleading with the court by which it was seeking authority to delay the trial of these proceedings. Nor did the Commission give notice to Respondent that it had filed such a pleading. Nor does R.A.D. 23 sec 13 give authority to either the court or to the Commission to go beyond the 60 days time limit which is set by the rule. No Respondent would argue that either the Commission or a Respondent could not seek by approriate pleading a reasonable extension. This is not the situation in this case. The Disciplinary Commission or its attorneys, without taking even the slightest formal action (and without notice to this Respondent)merely filed the case away. The hearing officer at page 38 under 77(c) indicates that the attorney for the Commission expressed concern, but there was no finding that the Commission ever filed any pleading with the (then) hearing officer requesting him to move the case along or set it for trial. The only pleading that seems to be contemplated by the hearing officer would be to remove the hearing officer. A simple pleading requesting that the case be set for trial could have been but was not filed with the hearing officer. Mr. Hughes says at Tr 446 line 22, "it's obviously a very delicate matter to suggest to the court that its own appointed hearing officer perhaps is too busy or ill or otherwise occupied to handle the matter and I did not undertake myself to make any contact with the court on that subject and never have in this case or any other." It could never be said that it is improper to file a simple pleading with the Court requesting that a pre-trial conference be se or that a trial date be set. The Disciplinary Commission simply failed to take this action. At Tr 480 line 11, Mr. Hughes indica that the Briggs case was in "limbo". This is recognition that the Disciplinary Commission had failed to take any action to move the case along. At Tr 483 line 17 and on the next page through line Mr. Hughes omitted that William Briggs had never filed a Motion for Continuance in this case covering the period of 11-78 through the tr of this case. The right to a speedy trial is a fundamental constitu tional right and is imposed by the due process clause of the 14th Amendment. See Barker v. Wingo, (1972) 407 U.S. 514, 33 L.Ed.2d 101 92 S.Ct. 2182. See headnote number 2. The same case establishes th "the primary burden is on the Courts and the Prosecutors to assure t cases are brought to trial;..." See headnote 26. The right to a speedy trial is a minimum right of the accused and it is preserved b command of the 6th Amendment. See page 37 of Dickey v. Florida (197 398 U.S. 30, 26 L.Ed.2d 26, 90 S.Ct. 1564 (in the same case it says, on page 36 of the U.S. Supreme Court reporter system, "can it be tha one becomes an "accused" only after he is indicted, or that the 6th Amendment subdivides prosecution into various stages, granting the right to speedy trial in some and withholding it in others. (Tr 31 testimony of Breskow, page 316 line 21 through page 317 line 1 See Due Process statement of Breskow (Tr 390 line 4 thru 14).

Ex. 1-8: The Issues presented in exceptions 1 and 2 of this Petition for Review refer to delay which may be analyzed under a fifth amendment due process approach or under a sixth amendment speedy trial approach. See footnote 5 to Scott v. State (1984) Ind App, 461 N E 2d 141.

Ex. 1-9: Indiana Courts have followed the line of authority that holds that the right to speedy trial attaches when a person is arrested or when he is formally charged by indictment or information which ever occurs earlier. See Terry v. State (1980) Ind App, 400 N E 2d 1158 and Scott v. State, supra, at 142. However, the U. S. Supreme Court has indicated that "prosecution of an accused can begin before his indictment; for example, in Escobedo v. Illinois, 378 U.S. 478, 490, 12 L.Ed.2d 977, 986, 84 S.Ct. 1758 (1964) the court indicated that, "when investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect." In the Briggs case the delay occurred after Respondent William J. Briggs was charged by a formal verified complaint in 1978.

Ex. 1-10: Delay in itself may a trigger an inquiry..place Respondent's right to a speedy trial into issue for consideration by the Court. In Barker v. Wingo (1972) 407 U S 514, 33 L Ed 2d 101, 92 S Ct 2182 an inquiry was triggered with a delay of two and one-half years between filing of formal charges and further proceedings. Certainly in Respondent's case the Disciplinary Commission and the Supreme Court of Indiana should have had notice and should have been triggered into action long before Respondent brought it to the Court's attention himself. The Court, on its own Motion, had an obligation under the Barker case to look into the matter. These constitutional issues and errors were called to the attention of the Court by Respondent when he filed his Response on or about 8-19-83 and again when he filed his 5-7-84 pleading with the Supreme Court and the Hearing Officer. He again raised the issues and requested a bifurcated hearing at the beginning of the trial which commenced on 7-12-84 but the Supreme Court and the Hearing Officer has chosen to deny any requests and to ignore the inquiry which was mandated by the Barker case. The testimony of Breskow, Executive Secretary of the Disciplinary Commission is very revealing. See Tr 389 start line 14 continuing through page 391 line 21. Note when asked if notice of constitutional issues ever triggered an inquiry, he indicated (as to dead or unavailable witnesses) "I don't believe I ever knew that. This was true although he indicated he had read the response wherein this was pointed out and at another point he says, "I frankly don't recall constitutional issues having been submitted. The court (the Hearing Officer) would not permit Staff Attorney Hughes for the Disciplinary Commission to answer whether the May 7, 1984, pleading on constitutional issues triggered an inquiry into constitutional issues. The Hearing Officer committed error in this respect.

Ex. 1-11: In Scott v. State, supra, at 143 the Court set out the balancing test of the Barker case for determining whether a Respondent has been deprived of his right to a speedy trial as follows: length of delay, Respondent's assertion of his right, the government's reason for the delay, and the prejudice to the Defendan The Court said that Indiana has already applied the Barker analysis to speedy trial claims under the Indiana Constitution in Wade v. State (1979) 270 Ind 549, 387 N E 2d 1309. However, Barker reaffir the 1970 Dickey case 398 U S 30, 26 L Ed 2d 26, 90 S.Ct 1564 wherei Justice Harlan indicated that the Defendant has no duty to bring

himself to trial but it is the duty of the Prosecutor to bring the Defendant to trial. Scott, supra, at page 143 reaffirms that (to take advantage of speedy trial errors) a Respondent need not prove that there was a deliberate attempt to delay the trial by the Prosecutor or that there was a deliberate attempt to hamper the defense. The case says that, "it is not only prosecutorial maneuvers in bad faith that are considered in the Barker balancing test. Scott indicates that such factors as negligence or over-crowded Court must be considered and that the ultimate responsibility for such circumstances must rest with the government rather than with a Defendant. Paragraph 3, page 143. In the Scott case the State's negligence was a factor which was considered along with prejudice to the Defendant.

Ex. 1-12: This entire area is discussed in great detail under Issue 1 under the Memorandum and Supporting Affidavits filed on 5-7-84, see page 1 et seq.

Ex. 1-13: Footnote Ex. 12-34a sets up the historical sequence of events which are related to what Respondent believes to be the inaccurate constitutional conclusions in this area as reported by the Hearing Officer at page 52 et. seq..

Ex. 1-14: The transcript at pages 230 through 420 indicates that it consists of 187 pages of testimony by Sheldon Breskow, Executive Secretary for the Disciplinary Commission. He has held such position commencing about 1-1-77 up to the present time which covers the entire time span during which the grievance was filed in 1977 until the trial in 1984. When his testimony is read, in toto, it reveals at best neglect or negligence or deliberate indifference toward moving the case along and at most unreasonable or deliberate delay in the prolonging of these proceedings for 7 or more years. Although the Respondent did notify the Disciplinary Commission and its staff of various constitutional infirmities caused by the delay, the Executive Secretary indicated he perhaps didn't even know about constitutional infirmities or death or unavailable witnesses and that the notice given by Respondents had made little if any impression upon him and certainly had not triggered an inquiry as is required by Barker and Dickey. In another revealing statement, the question is asked at Tr 381 line 22, "had you had any knowledge or had you given any thought to the fact that over 2,000 days have elapsed from 11-78 to 7-83?" His answer is: "No, I haven't given it any thought."

Ex. 1-15: In the Dickey case in footnote 5 on page 30 of the U.S. Supreme Court reports (citation for Dickey is above) it shows that the Defendant had filed an Affidavit setting out that one particular witness had died during the delay. It further set out that had she been available she would have testified to certain facts. This is exactly what the Respondents William J. Briggs and Florence Anne Briggs have attempted to do in more than one instance herein. Not only were offers to prove made at the hearing, but in their pleading raising constitutional issues which were filed on 5-7-84, they included such an Affidavit as is contemplated by Dickey in which they set out the loss of over 23 witnesses. Neither the Disciplinary Commission, the Hearing Officer, or the Supreme Court of Indiana has given the slightest recognition that this Affidavit was filed. In addition, the constitutional problems were pointed out at the time William J. Briggs and Florence Anne Briggs, Respondents filed their Responses in 8-83 to the Amended Complaint. Respondents William J. Briggs and Florence Anne Briggs filed a written pleading with the Supreme Court of Indiana and with the Hearing Officer requesting dismissal and/or a summary judgment because of the delay. The only response was a short Order of denial which was entered by the Supreme Court of Indiana--but only after a second follow-up pleading requesting that consideration be given to the pleading which was filed by the Respondents.

Exception 2. Denial of right to speedy trial.

Respondent excepts to the Hearing Officer's Report because Respondent has been deprived of the right to a speedy investigation and a speedy trial, and Respondent was denied his protected right--for the Disciplinary Commission to observe its duty of bringing Respondent to speedy trial and its duty to Respondent to insure that the trial would be consistent with due process, in violation of Article 1, Sec. 12 of the Indiana Constitution and Amendment 6 of the U. S. Constitution which is an obligation of the States by way of Amendment 14 of the federal due process clause. Although the harm to Respondent is somewhat overlapping and is more fully set out under the exception relating to denial of fair trial, the rights and obligations are distinct and provide separate and additional guarantees of protected rights for this Respondent which have been violated.*

*See footnotes Ex. 2-1 et. seq.

Ex. 2-1: Exceptions 1 and 2 of this Petition for Review were listed as Issues 1a and 1b in the Petition to the Court and Memorandum in Supporting Affidavits filed by the Respondent with the Supreme Court on 5-7-84.

Ex. 2-2: These proceedings have been prolonged for 7 years since the grievance has been on file. The docket sheet in this cause in the Indiana Supreme Court reflects the lack of action by the Disciplinary Commission. See page 1 in the 5-7-84 memorandum under Issue 1.

Ex. 2-3: The state has the duty to bring Respondent to trial as well as the duty of insuring that the trial is consistent with due process. Barker v. Wingo, 407 U S 514, 33 L Ed 2d 101, 92 S Ct 2182 (1972). See paragraph 20. "Society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest." Paragraph 21 of Dickey.

Ex. 2-4: Unjustifiable delay coupled with actual prejudice violates due process. Lusher v. State, 390 N E 2d 702 (1979); U. S. v. Lovasco, 431 U S 783, 97 S Ct 2044, 52 L Ed 2d 752 (1977); and U.S. v. Marion, 404 U S 307, 92 S Ct 455, 30 L Ed 2d 468 (1971).

Ex. 2-5: Due process is not merely limited to jurisdiction over the subject matter and the persons but it includes procedural due process, that is, ways of asserting and conducting disciplinary proceedings fairly and openly with full legal rights and remedies to be used by the party under attack. Blake v. N. Shore Multiple Listing Service, Inc., 367 N Y S 2d 440, 447, 81 Misc. 2d 793.

Ex. 2-6: "...we are not aware of any rule of practise that would authorize the attorney for the commonwealth to file the indictment away on conditions and hold the prosecution in terrorem over the defendant, and we do not approve of such practice." Jones v. Commonwealth, (CA Ky) 71 SW 643 (1903). The Barker case recognizes one of the harms to a Defendant for delay. Even though a Respondent or Defendant is not in custody, he is unable to lead a normal life because of community suspicion and his own anxiety. See paragraph 18 of Barker and in Dickey v. State of Florida, 398 U.S. 30, 26 L.Ed.2d 26, 90 S.Ct. 1564 the Court quotes the Klopfer case (398 U.S. 42) and indicates, "lengthy prosecution may subject an accused to public scorn and deprive him of employment, and most certainly will force curtailment of his speach, associations and participation in unpopular cases." The Court goes on to say, "these disabilities, singly or in league, can impair the accused's ability to mount a defense. The passage of time by itself, moreover may dangerously reduce his capacity to counter the prosecution's charges. The Scott case has recognized this. See page 143, paragraph 4 where it says speedy trial is "to minimize anxiety and concern of the accused". The reaction of Mr. Hughes as to use of the term in terrorem is shown in his testimony. (Tr 483 page 483 line 22 through page 484 line 16.) He disapproves of the word in terrorem. He indicates that this would imply an intentional delay by the prosecution of this matter. If this were so, then a Defendant in any criminal case and a Respondent in a Disciplinary Case would be required to prove that the prosecution intentionally delayed this case so as to hold a Respondent or Defendant in terrorem. Scott says at page 143 in paragraph 3, "in any event, the State's failure to proceed with the

case was not a deliberate attempt to delay the trial in order to hamper the defense. However, it is not only prosecutorial maneuvers in bad faith that are considered in the Barker balance. In Barker, the Court noted more neutral reasons such as negligence or over-crowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the Defendant" Barker, 407 U.S. at 531, 92 S.Ct. at 2192. The Court stated in Scott, "the State's negligence in proceeding with the prosecution is a factor that must be considered along with the prejudice to the Defendant." The Court would not permit Mr. Breskow to answer as to what penalogical purpose has been served by holding Bill and Anne Briggs in terrorem for seven years during the pendency of these proceedings. This was error. (Tr 392, testimony of Breskow page 392 line 18). The state of mind of the Executive Secretary, Mr. Breskow, and Attorney Hughes for the Disciplinary Commission is relevant. Were they merely negligent? Was it benign neglect? Were they uninterested? Was it a tactical maneuver from which the prosecution thought it could make a gain for prosecution? Was it intentional in order to harm Bill and Anne Briggs? These questions are relevant to the ad hoc balancing test as set out in the Barker v. Wingo case. Since neither the Supreme Court of Indiana or the Hearing Officer would permit a hearing on a Motion to Dismiss or Summary Judgment or even a bifurcated hearing in advance of the trial, then this is the only opportunity that these Respondents would have to present this evidence to a tryer of the facts. This is an example of being denied the right to present facts to vindicate rights which are guaranteed in the U. S. Constitution at a hearing. If the hearing denies an opportunity to elicit facts, the hearing is fundamentally unfair.

Ex. 2-7: Adjudication of disciplinary proceedings is a judicial act. Sup. Ct. of Virginia v. Consumers Union, 446 U S 719, 64 L Ed 2d 641, 100 S Ct 1967 (1980). Once adopted the Court is bound to follow rules and apply them uniformly in order to satisfy equal protection and due process requirements.

Ex. 2-8: Indiana R.A.D. 23, Sec. 13, limits the time period to 60 days in which the Hearing Officer is empowered to hold a hearing on the merits of a complaint. There is no provision for extending the time or for reappointing a Hearing Officer who has allowed the time to lapse. It has been over 2050 days from the qualification of the first Hearing Officer through commencement of trial on 7-12-84. Breskow, Executive Secretary, indicated that he had not any knowledge or had not given any thought to the fact that over 2,000 days have elapsed from 11-78 to 7-83 (Tr 381 line 14 through line 25).

Ex. 2-9: Indiana R.A.D. 23, Sec. 13, is not unconstitutional on its face because it provides for a prompt hearing within 60 days from the filing of the complaint. However, it has been applied in an unconstitutional fashion in Respondent's case. In his testimony, Mr. Breskow indicated that, "as a practical matter, nobody goes into these cases believing that they will be submitted (to the Hearing Officer) within sixty (60) days." (Tr 394, testimony of Breskow line 18, page 394). This indicates that the Disciplinary Commission makes no attempt to comply with the sixty (60) day rule which is mandatory. No permission was sought or received from the Court and no request was made for William J. Briggs to waive the sixty (60) day rule, and he did not do so.

Ex. 2-10: Respondent has a faded memory due to the extraordinary delay and the extreme mental stress he has suffered from repeated attacks on his character by grievants. Almost all witnesses were unable to recall accurately events in the Complaint which were premised on remote times in the 1960s. The Respondent's defense was seriously hampered. He is not able to cause the record to reflect the loss of the memory of the witnesses because "what has been forgotten can rarely be shown." Respondent has been "unable to lead a normal life because of community suspicion and his own anxiety." Barker v. Wingo, 407 U S 514, 33 L Ed 2d 101, 92 S Ct 2182 (1972); Scott v. State, 461 N E 2d 141 (Ind.App. 2 Dist. 1984); and Dickey v. Florida, 398 U S 30, 26 L Ed 2d 26, 90 S Ct 1564 (1970).

Ex. 2-11: Where a judge had died during the delay this was considered in determining prejudice to attorney. In re Adriaans, 28 App. D C 515 (1907).

Ex. 2-12: Death of attorney for Respondent in a disciplinary case was one factor contributing to prejudice (from delay) which barred trying Respondent. In re Adriaans, supra.

Ex. 2-13: Erdmann v. Stevens, 458 F 2d 1205 (1972), and Younger v. Harris, 401 U S at 46, 91 S Ct at 751, 27 L Ed 2d 669 (1971). Respondent could not recover lost testimony and evidence and; therefore, the trial could not be fair and a full record now can not be devloped.

Ex. 2-14: The disciplinary lawyers hadthe duty to develop "a full and fair record". A.B.A. Code of Professional Responsibility E.C.7-14(1977) but their delay actually prevented this.

Ex. 2-15: Respondent was required to proceed to trial on 7-12-84. As a result the Court required Respondent to present a partial and an incomplete defense on the merits which was an act of futility. There was a denial of a fair trial and a meaningful opportunity to be heard. This was a fundamental error which denied Respondent due process of law as guaranteed by amendments 5 and 14 of the U. S. Constitution and by Article 1, Sec. 12 of the Indiana Constitution. See the Dickey case and Harlan's concurring opinion, in which he states, that procedural fairness applies. Trial on merits did pose a threat to Respondent's constitutional rights which were not eliminated by presentation of same as a defense at the trial. See the Erdmann v. Stevens case as set out above.

Ex. 2-16: Respondent brought this to the attention of the Hearing Officer and the Indiana Supreme Court prior to the trial which began on 7-12-84. On the first day of the trial again the Respondent requested a hearing before the trial commenced. The Hearing Officer refused to even bifurcate the trial, so that Respondent could present his constitutional rights. This was refused. As a result a partial and incomplete defense has resulted and has produced an incomplete record which will prevent Respondent from ever seeking effective judicial review. He is now denied the right to effective judicial review (by appeal) which is a right given to others in a similar situation and thus he has been denied equal protection and due process.

Ex. 2-17: Our U. S. Supreme Court has said, "But it must be remembered that the right of a lawyer or bar applicant to practice his profession is often more valuable to him than his home, however expensive that home may be. Therefore, I think that when a State seeks to deny an applicant admission or to disbar a lawyer, it must proceed according to the most exacting demands of due process of law." Law Students Civil Rts. Res. Coun., Inc. v. Wadmond, 401 U S 154, 91 S Ct 720 (1971). Respondent has been denied this right.

Exception 3. Loss of jurisdiction.

The Respondent excepts to the Hearing Officer's Report for the reason that the Supreme Court of Indiana, its Hearing Officer and the Disciplinary Commission have all lost jurisdiction of this Respondent and this particular case, and this occurred prior to the hearing on the merits. The Disciplinary Commission and the Supreme Court of Indiana derive their jurisdiction and authority from R.A. D. 23. They are required to abide by this rule in order to satisfy requirements for notice, due process, and equal protection. Ex. 3-
Indiana R. A. D. 23, Sec. 13 limits the time period to 60 days in which the Hearing Officer is empowered to hold a hearing on the merits of a complaint. There is no provision for extending the time or for reappointing a Hearing Officer who has allowed the time to lapse. It was over 2050/from days qualification of the first Hearing Officer to the time of the trial, and over 750 days from the time of qualification the last Hearing Officer, Judge Morton who actually conducted the hearing. Respondent in making this exception does not contend that R. A. D. 23, Sec. 1 is unconstitutional on its face, because it provides for a prompt hearing with in 60 days from the filing of the complaint. However the exception is taken because of the unconstituional fashion in which the rule has been applied in this case. The prompt post-complaint hearing requirement has been unreasonably and grossly ignored not by the fault of the Respondent, and while Respondent has not been suspended during the interim, he has been seriously harmed by being held <u>in terrorem</u> for all of these years; has been denied the equal rights and protection granted to other lawyers such as a fair trial and speedy trial and the attendant harm set out fully in other exceptions of this Petition dealing with delay, fair trial and speedy trial.*

*See footnote Ex. 3-1 <u>et. seq</u>.

Ex. 3-1: The Supreme Court of Indiana derives its authority to make rules and adjudicate disciplinary matters, as original actions, under the Indiana Constitution, Article 7, Sec. 4.. Adoption of rules is a legislative act. Adjudication of disciplinary proceedings is a judicial act. Sup. Ct. of Virginia v. Consumers Union, 446 U S 719, 64 L Ed 2d 641, 100 S Ct 1967 (1980). Once adopted the Court is bound to follow rules and apply them uniformly in order to satisfy equal protection and due process requirements. The preliminary statement to the Indiana substantive law provides, "within the frame work of fair trial, the disciplinary rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities." See Burns Indiana Statutes annotated, Court Rules, Book 2, page 291.

Ex. 3-2: See Memorandum On Excess Jurisdiction which follows:

Ex. 3-3: The executive secretary of the Disciplinary Commission makes no pretext about saying that the Disciplinary Commission intends to live up to the rules (R. A. D. 23, Section 1, which requires that a hearing be held within 60 days after appointment of a hearing officer. At TR 394 in the record, Mr. Breskow says: (line 18---..."nobody goes into these cases believing that they will be submitted within sixty days." Nothing could more defintiely demonstrate that the Executive Secretary does not believe that the Commission is required to abide by the Rules For Admission and Discipline.

IN THE SUPREME COURT

footnote Ex. 3-2 OF THE

STATE OF INDIANA

IN THE MATTER OF
WILLIAM J. BRIGGS

CAUSE NO. 1078 S 235

MEMORANDUM ON EXCESS JURISDICTION

1. MEMORANDUM: "The acts of a Court in excess of its jurisdiction are void even if it has jurisdiction of the subject matter of the action and of the parties,..." Garner v. Garner, 189 P.2nd 397 (1948). See headnote 11. For a full discussion of jurisdiction of courts, see 20 Am.Jur.2nd, page 449 and Section 87 et. seq. Also see 21 C.J.S. page 28 and Section 15 et. seq.

2. Excess jurisdiction is discussed at 21 C.J.S. 37, Sec. 25 which states:

> "Excess of jurisdiction may be defined as a state of being beyond or outside the limits of jurisdiction, and, as distinguished from the entire absence of jurisdiction, means that the act, although within the general power of the court, is not authorized, and therefore void, with respect to the particular case,..."

3. The Indiana Case of Robison v. State (1977) 359 N.E.2nd 924 shows that a Court under Indiana law may lose jurisdiction to perform a particular act. In that case the Court said, "where the Court deliberately postpones indefinitely the pronouncement of judgment and sentence, the Court loses jurisdiction to sentence and upon application the defendant should be discharged." IBID page 924. In that case the Court stated that the action of withholding judgment was not authorized by statute or rule. In other words if the Court is not granted authority by statute or rule, then when it purports to take some action beyond the scope of its

limits, the Court loses jurisdiction. In a prior Indiana case Warner v. State (1924) 143 N.E. 288, the Court stated "...in an attempt by the Court indefinitely to postpone sentence, judgment and sentence about one year and five months later, held beyond the jurisdiction of the Court to render,...".

4. The Indiana Court of Appeals has stated in Smith v. Beneficial Finance Company of Indianapolis, Inc. (1966) 218 N.E.2nd 921 that the "Practice of turning to decisions of tribunals and other jurisdictions is appropriate when there is lack of authority in Court's own jurisdiction but where authority exists in its own jurisdiction, Court is bound to give such authority primary consideration."

5. In the Indiana Case of Lemond v. McCormack (1980) 413 N.E.2nd 228 the Court stated at page 246 that a certain section of the Indiana Code gave exclusive original jurisdiction over a particular type of case to a certain Court. The Court went on further to state "the exclusive original jurisdiction may only be obtained by the (juvenile) Court as set forth above and unless such preliminary statutory procedural steps are taken there is no jurisdiction established." This clearly demonstrates that even though a Court may have jurisdiction of the subject matter, it must comply with the procedural steps in the statute or rule in order to acquire jurisdiction.

6. In the Ohio Case of Levin v. National City Bank of Cleveland (1953) 11 N.E.2nd 918, this was a case where habeas corpus proceedings were brought to secure release of a person from a state hospital. The Court held "that the procedure was not such as is contemplated and required by the statutes and operated to deprive the person of due process of law as guaranteed by Section 16, Article 1 of the Ohio Constitution, and 14th Amendment to the Federal Constitution.". In the Case of State Board of Medical Examiners (IN RE: Nathan)(1949) 206 P.2nd 211, the Court stated that "it is within the power of the legislature to vest in executive officers the power to promulgate administrative rules, (with reference to controling the practice of medicine)...but this is never deemed to extend to making of rules to subvert the statutes."

The Court further stated, "it is a fundamental principal of our system of government that the rights of men are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus...."

7. In the Indiana Case of Lowery v. State Life Insurance Com. (1899) 54 N.E. 442, the Supreme Court found that the Court did not have jurisdiction of a particular case because the application to the Court was required to be made by the Attorney General and no other entity. The Court stated on page 442, "A Court is a creature of the law, instituted for the determination of questions of law and facts under defined restrictions and limitations. The territorial limits of its power, the subjects and classes over which its powers may be exercised, the terms upon which it may put its power into action, are as firmly and clearly established as the right to ajudicate when authorized to do so; and, though a Court of general jurisdiction, it must proceed in the manner ard upon the conditions imposed by the law, and an assumption of jurisdiction over a subject or a person, upon terms denied by the law, is as unwarranted and futile as the assumption of jurisdiction without its territorial limits. A departure from the limits and terms of jurisdiction is usurpation of power and imparts no validity whatsoever to its judgments and decrees." In the Oklahoma Case of Allison v. Howe (1951) 230 P.2nd 706, the Court indicated that where a Court assumes to act under a special statute, under which it acquired jurisdiction, then the power and jurisdiction in that proceeding is limited by the terms of the act and any act done or decision rendered outside of and beyond the limits of the jurisdiction are in excess of jurisdiction and void. This is a paraphase.

8. The recent case of Twyman v. State, 459 NE 2nd 705 (Ind 1984) states at page 707, "Jurisdiction is a lagal power to entertain any matter or proceeding, and the power to act must be derived from the Constitution or from some statute." This cites the Indiana case of Farley v. Farley (1973) 300 NE 2nd 375.

Exception 4. Denial of effective judicial review.

Respondent has been denied and is being denied -- effective judicial review as guaranteed by: Article 1, Sections 12 and 23 of the Indiana Constitution and the 5th and 14th Amendments of the U. S. Constitution. Respondent notified both the Indiana Supreme Court and the Hearing Officer before trial that if Respondent were required to proceed to trial on July 12, 1984, the Court would be requiring him to present a partial and incomplete defense on the merits--an act of futility, and a denial of a fair trial and meaningful opportunity to be heard. That this would be a fundamental error which will deny Respondent due process of law as guaranteed by Amendments 5 and 14 to the U. S. Constitution and by Article 1, Sec. 12 of the Indiana Constitution.

Respondent further notified both that trial on the merits under the circumstances set out in the past paragraph posed a threat to his constitutional rights which could not be eliminated by presentation as a defense at trial.

The trial (Hearing) on the merits has resulted in a partial and incomplete defense and in a partial and incomplete record. An incomplete record will prevent Respondent from ever seeking effective judicial review. Respondent will be denied the right to effective appeal given to others in a similar position and thus will be denied equal protection of the laws and due process.*

*See footnotes Ex. 4-1 et. seq.

## LOST RECORD CAUSED BY DELAY

Ex. 4-1: The prejudice to a Respondent has been recognized by the Court of Appeals of Indiana in Scott v. State (1984) Ind App, 461 N E 2d 141 which presents the matter directly from the Barker case: on page 143 Scott says, "...the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." See 407 U S at 532, 92 S Ct at 2193.

Ex. 4-2: Respondent raised the severe and substantial constitutional violations both with the Supreme Court and with the Hearing Officer prior to the trial. Respondent again raised the issue on the first day of the trial. Respondent during the first few days of the trial attempted to make pro se objections. The Hearing Officer ruled that no objections could be made by the Respondent pro se but must be made through his attorney. The Respondent by a pleading filed on 7-18-84 gave notice and further objection in writing to the Court that his rights had already been violated by this ruling by the Hearing Officer. Respondent pointed out that the ruling which prevented him from raising constitutional violations unduly hampered his defense and made it impossible for him to have a fair trial. Respondent pointed out that Mr. Rakestraw, his attorney, had not been present during the long history of this affair, that he did not participate in preparing the constitutional memorandum which was filed on 5-7-84 nor in the Response which had been filed prior thereto and that he was not as well acquainted with the constitutional violation that objections are required to be made promptly and that already because of the ruling of the Court, the Court has ruled that William Briggs waived an objection to the receipt of and the striking of testimony of Alan Brubaker and Bobby Ritchey. The exception to the ruling was made in writing with a request that the Respondent be permitted to make pro se objections on constitutional issues. The Court reluctantly permitted Respondent to make such objections limited only to constitutional issues and then only on a limited basis. The Court severely limited the right of the Respondent to seek redress of grievances for constitutional errors in this case.

Ex. 4-3: On Friday, 8-3-84, Mr. Hughes, at the hearing, asked William J. Briggs several questions relating to events which had occurred in the 1960s. Over the weekend and on 8-6-84, the Respondent read over some of his previous answers and responses to grievances and found that his answers at the hearing had been incomplete and that indeed his own memory was faded by the passage of 10, 15 or 20 years to which questions related. Respondent filed a pleading setting out this problem and the unfair tactical advantage which was being used by Attorney Hughes for the Disciplinary Commission in cross-examining Respondent by use of prior evidence relating to events of so many years ago. The Court in the Scott case referred to Barker's thoughts on prosecutorial maneuvers in delay which hampers defense.

Ex. 4-4: Respondent has a faded memory due to the extraordinary delay and extreme mental stress which he has suffered from repeated attacks on his character by grievants. In addition, almost all witnesses were unable to recall accurately events in the Complaint which were premised on remote times. Respondent's defense was seriously hampered here. He is not able to cause the record to reflect the loss of the memory of the witnesses.

Ex. 4-5: The disciplinary lawyers had the duty to develop a full and fair record. ABA Code of Professional Responsibility E.C. 7-14 (1977) but their delay in this case actually prevented the development of a full record.

Ex. 4-6: Although Respondent brought these constitutional problems and issues to the attention of the Hearing Officer and the Indiana Supreme Court, he was required to proceed to trial on 7-12-84. As a result, a partial and incomplete defense has resulted and has produced an incomplete record which will prevent Respondent from ever seeking effective judicial review. He is now denied the right to effective judicial review which is a right given to others in a similar situation and thus he has been denied equal protection and due process in addition to his right of redress under Article 1, Sections 12 and 23 of the Indiana Constitutional and the 5th and 14th of U. S. Constitution.

Ex. 4-7: A list of witnesses who were not available to testify at the hearing is set out on page 2 of Respondent's pleading Memorandum and Supporting Affidavits filed on 5-7-84. An Affidavit relative to each witness who was unavailable was made a part of that Memorandum commencing at page 56 which set out proposed testimony. Offers to prove were made or attempted to be made. Mary Bernice Smoker was the only real party and interest as a grievant and she should have been the chief witness in this case except for the delay in prosecution. See footnote Ex. 1-3 for a listing of one aspect of the loss of her testimony. See Ex. 1-5 for the harm by lost testimony of Ralph Hanna and Ex. 1-6 for harm of lost testimony of James Stewart. In addition, Bertha Wolfe was a key witness. The importance of the testimony of Bertha Wolfe is reflected in footnotes Ex. 12-1a through 33a. The Hearing Officer's comment that her testimony would have only been cumulative shows (in the footnotes) that the Hearing Officer had a lack of understanding of this importance and paid scant attention to her important testimony in her deposition. This was why it was so important for Mrs. Wolfe to appear personally at any trial of this matter since she is such an exceptionally trustworthy person and gives the appearance of being believable.

Ex. 4-8: The undersigned Respondent, hereby incorporates all of the pleadings which he and Florence Anne Briggs filed prior to and during the trial at Rochester before Judge Morton. According to the Hearing Officer, all of those motions and pleadings have been transmitted to the Supreme Court and accordingly they would be a part of the record in this case. The Respondent respectfully requests the Court to take those pleadings into consideration and particularly those which are mentioned in the footnotes to Exception 4.

Ex. 4-9: Most of the offers to prove are found in the testimony of Florence Anne Briggs covering Tr 171 through 215. These should be read in conjunction with the Affidavit relativetto the witnesses which was filed with the pleading on May 7, 1984. It starts at page 56 in that pleading. No Affidavit and no offer to prove could ever supply the omission of a dead or unavailable witness. It is a reconstruction at best. Respondent, William J. Briggs, has a faded memory with respect to certain facts, especially in a case that has been so many faceted and has continued on through so many hearings in civil litigation. There is no written documentation, as it will be contended by the Disciplinary Commission for many events which occurred although there is testimony from Bertha Wolfe as to whether William Briggs advised Smoker to seek advice of another

lawyer before the 1968 Will was made and before the 1970 Will was made and thereafter, there is no documentary proof that such advice was or was not given. It is totally unreasonable to expect this Respondent to come forth with facts to rebut charges and allegations in a complaint alleging that facts occurred before and around 1968 and 70. Furthermore, since the language of the Canons are vague and uncertain, it is totally unreasonable to expect this Respondent to remember all of the exceptional circumstances which the Hearing Officer says must be considered with reference to events which occurred in 1968, 1970, and 1976. Since there is no adequate explanation of what would be considered as to be an "exceptional circumstance," it places an impossible burden and certainly an unreasonable burden upon any Respondent to make recall after all of these years. Quite clearly this was demonstrated at the hearing when on August 3, 1984, Mr. Hughes asked this Respondent, William J. Briggs, several questions relating to events which had occurred in the 1960s. Over that weekend thereafter the Respondent read over previous answers and responses and found that his answers at the hearing had been incomplete and indeed his memory had been faded by the passage of 10, 15 or 20 years. The delay and the prolongation of these proceedings, for whatever reason be it deliberate, intentional, neglectful, by negligence, or whatever, is an unreasonable prolongation or delay. The harm has been demonstrated. The Respondents have been presented from presenting an adequate and full defense. They have been deprived of due process of law. Even at this stage, they could never provide a record to show the loss of evidence which they could have used in the trial of this matter if it had been tried timely.

Ex. 4-10: How the prolongation of these proceedings have affected the charge against William J. Briggs as to his delay in termination of the guardianship and as to the charge of harassment. The delay of the trial by the Disciplinary Commission has placed Respondents William J. Briggs and Florence Anne Briggs at a very special disadvantage and has given an unfair tactical advantage to the Disciplinary Commission. With reference to the charge of harassment of William J. Briggs, one witness, Clarence Watson, died only in 1984. His death came up rather suddenly when it was discovered that he had a brain tumor unknown to anybody until in 1984. He knew Kate Smoker, and Jean Jones, and William J. Briggs and several other participates. He frequently visited in the Briggs Office. He talked with Kate Smoker when she came into the office so very often and voluntarily after the Petition to Remove was filed and also after the time of the alleged fish story. He was present in the office at the time of the "missing file incident" which occurred with Jean Jones. He could have testified as to matters related to Jean Jones, while she was retained in the office, and the missing file incident. He could have testified with reference to the fish story, her attitude towards same, and attitude towards Mr. and Mrs. Briggs. The prolongation of these proceeding has denied William J. Briggs and Florence Anne Briggs the benefit of this valuable testimony having todo especially with the charge of delay in termination and as to the charge of harassment and in particular as to the fish story. This lost evidence alone skewed the entire fairness of the charges of delay and harassment. The offer to prove for this particular witness is found at Tr 190 et. seq."

Exception 5. Denial of right to redress as private citizen.

Respondent has been denied his rights under Amendment 1 to the U. S. Constitution and Article 1, Section 12 of the Indiana Constitution which all U. S. Citizens have, that is, the right to seek redress of grievances including timely redress for constitutional errors in violation of protected rights. Amendments 5 and 14 to the U. S. Constitution guarantee due process of law to citizens of all of the United States which includes right to seek redress of grievances. Respondent has been denied his rights timely when redress would have been meaningful at a time before trial on the merits. Such redress has been delayed until after it is meaningless. Respondent raised this issue in his pleading filed as a Response to the Grievance on or about August 19, 1983 about 11 months before the trial and again on or about May 7, 1984 before the trial which began on July 12, 1984, and requested a hearing from the Supreme Court of Indiana on same, and also from the Hearing Officer. Both denied his request. Again on the first day of the trial, Respondent made the request for hearing on same before the Hearing Officer which was denied. The May 7, 1984 pleading presenting Constitutional Issues and Memorandum for same is a part of the record in this case, it having been filed with the Supreme Court of Indiana and in Rochester, Indiana with the Hearing Officer. Those documents are incorporated herein and form the basis for a brief upon same, including a brief for all of the other Constitutional issues raised and for which relief was requested and denied. *

*See footnotes Ex. 5-1 et. seq.

Ex. 5-1: A private citizen does not surrender his right to freedom of expression when he becomes a licensed attorney and can not be disciplined for exercising first amendment rights. Polk v. State Bar of Texas, 374 F Supp 784 (1974). This principle would apply to any right secured by the U. S. Constitution. The Supreme Court has built a substantial line of cases where the Constitution has been read to limit and restrain the state's power to prescribe standards of conduct for attorneys. Spevack v. Klein, 385 U S 511, 87 S Ct 625, 17 L Ed 2d 574 (1967); NAACP v. Button, 371 U S 415, 83 S Ct 328, 9 L Ed 2d 405 (1963); Konigsberg v. State Bar of California, 353 U S 252, 77 S Ct 772, 1 L Ed 2d 810 (1957). Polk, supra.

Ex. 5-2: See Issue #3 on page H as presented in 5-7-84 pleading and page 18 of the Memorandum of the same date.

Ex. 5-3: The Disciplinary Commission seeks in this proceeding to prevent Respondent from exercising his right to redress of grievants by charging him with misconduct as a private citizen for contesting a Will--a form of freedom of expression to say that a wrong has been committed. Respondent's rights are chilled. Because he is being threatened with professional discipline for attempting to exercise his constitutional first amendment rights as a private citizen.

Ex. 5-4: At page 19 in Respondent's Memorandum filed 5-7-84, Respondent included an Affidavit showing the urgent necessity for the holding of a hearing as to constitutional issues prior to the trial. This special supporting Affidavit is especially called to the attention of the Court.

Ex. 5-5: See footnote Ex. 4-8. The Court is asked to consider the motions filed during the trial in connection with this Exception 5.

Ex. 5-6: Respondent was denied his free speech First Amendment right to appear before the Disciplinary Commission and present political aspects of these proceedings against him and criticism thereof. See footnotes 10-3, 104, and 10-5. Also Attorney Joseph T. Ives together with William J. Briggs and Florence Anne Briggs went to the office of the Disciplinary Commission on or about July 14, 1978 at the meeting at which it was discussin the greivance against them and the report of investigation for same. They requested appearance at that time but were refused. Later both Respondents or or about July of 1982 made a written request to appear before the Disciplinary Commission. The Executive Secretary of the Commission wrote and sent denial of request. See event 54, and event 85 in Pleading filed on May 7, 1984 designated as Memorandum and supporting affidavits.

Exception 6. Denial of timely and meaningful right to redress.

Respondent and all members of the Indiana Bar are deprived in disciplinary cases of a timely opportunity before the trial on merits to raise and ottain a hearing on right of redress for violations of Constitutional Rights as protected by Amendment 1 of the U. S. Constitution and by Article 1, Sec. 24 of the Indiana Constitution. Section 14 of Indiana R. A. D. 23 is unconstitutional on its face because it provides, "no motion to dismiss or dilatory motion shall be entertained...." No Court has cited any Rule under the Rules for Admission and Discipline of Indiana which provides any remedy at all, adequate or otherwise. This is pointed out by the Hearing Officer's Report at page 53, paragraph 94. Belatedly the Hearing Officer stated that under the Sekerez case he could have held (he indicates he should have held) bifurcated hearings on the procedural matters (separated from substantive matters). His citation is to the opinion of the Supreme Court of Indiana (1984) 458 N.E. 2d 229, however this case was taken up as a federal case, at 685 Fed.Rep. 2d 202 (1982). It states at 206:

> "The appellant is given the opportunity to challenge the constitutionality of the statute at the initial hearing with the hearing examiner."

Even though R. A. D. 23, Sec. 14 is written in the "shall" mandatory language----"no motion to dismiss or dilatory motion shall be entertained..." use of this rule as a bar to raise state and federally protected rights would be a flagrant violation of constitutional rights. The Sekerez case confirms that Respondent had a right which was denied to him. The Respondent in this case was denied his right as guaranteed by the U. S. Constitution as confirmed by Sekerez case to raise his constitutional claims in a timely manner at a separate hearing on same before the Hearing Officer. This was not done, although the Hearing Officer, it appears to Respondent, patiently but reluctantly permitted Respondent some but not adequate time in a very long and complex trial "to squeeze in hurriedly some constitutional issues." Lack of bifurcation in this complex trial prevented a meaningful opportunity to present constitutional issues. Ex. 6-1

Ex. 6-1: Sekerez v. Sup. Ct. of Indiana (1982) 685 F 2d 202 cited the question of whether the State proceedings allow a Respondent to challenge the validity of some state statute. Respondent in this exception 6 is not only challenging the validity of some state rule. He is also contending that procedural due process--and the exercise of his right of redress of grievance--includes the concept that he is to have a meaningful and timely opportunity to present his defense and in this case constitutional issues. He contends that he is not to be provided just an opportunity but it must be a meaningful and timely opportunity. See Fuentes v. Shevin, 92 S Ct 1983, 407 U S 67, 32 L Ed 2d 556, re-hearing denied 93 S Ct 177, 409 U S 902, 34 L Ed 2d 165. In the federal Sekerez case at 206 at the bottom of the page the hearing before the Hearing Officer is found to be the "adjudicative" stage of the proceedings which are said to commence with the hearing before the Hearing Officer. This is the trial as it is known in anyother case. Going further, the Court in Sekerez said, "the appellate stage of the state disciplinary proceedings begin when a petition is filed for review. The attorney may then challenge findings of the Hearing Officer." This Respondent has taken advantage of whatever opportunity has been granted to him, by presenting two pleadings before the adjudicative stage, one or more pleadings at the adjudicative stage and oral motions at the adjudicative stage. This case contains a vast door of constitutional issues as is evidenced by Respondent's pleading filed on 5-7-84 with Memorandum and as is evidenced by this Petition for Review. As of this time, the Supreme Court has totally ignored Respondent's request for considerations except for a cursory turn down. At the adjudicative stage, before the Hearing Officer, the Respondent was denied at the commencement of the hearing a bifurcated hearing set aside and devoted to these complex and numerous constitutional issues. During the trial the Hearing Officer, did allow some time although it was not ample, it was insufficient, it was hurried, it was not free of trial distractions and was not meaningful as is required by the U. S. Constitution.

Exceptions 7 & 8. Ex post facto consideration.

Respondent has been deprived of the Constitutional protection which prohibits enforcement retroactively of the Code of Professional Responsibility of Indiana in an ex post facto fashion. The protection is guaranteed by Article 1, Sec. 24 of the Indiana Constitution; Article 1, Sec. 10, Clause 1 of the U. S. Constitution and Amendments 5 and 14 of the U.S. Constitution protect against lack of notice, Further protection is provided against violations of a ruling precedent of the Indiana Supreme Court as follows: "A rule changed by the Supreme must operate prospectively and not retroactively." State ex rel Benjamin v. Criminal Court of Marion County, 264, Ind. 191. 341 N.E. 2d 495 (1976). The Disciplinary Commission, in its original complaint filed in 1978 alleged violations by acts and circumstances at remote times many years before 1971 in which year the Disciplinary Rules were adopted in the State of Indiana. The complaint charged violations of the not yet adopted Disciplinary Rules. The complaint was amended by the Disciplinary Commission in 1983 with no attempt whatsoever to correct this basic constitutional defect. The issue was raised by this Respondent at the time he filed his Response to the First Amended Complaint in August of 1983 at page II-62 and 63. He raised it again in his special pleading on Constitutional Issues on May 7, 1984 in which Respondent ask for hearing before the Indiana Supreme Court and also before the Hearing Officer. Both entities denied his request. At the 13th hour on June 15, 1984(before the trial set on July 12, 1984 and two days before Respondent's attorney left for vacation in Europe and did not return until almost the day of the trial) the attorney for the Disciplinary Commission moved to amend the already amended complaint. Attorney Hughes had been aware since April 4, 1984 that Mr. Rakestraw was leaving on vacation. The Hearing Officer approved the

7 & 8-1

Motion to Amend even though Respondent filed beforehand a timely
7 & 8-2
pleading in opposition thereto in which Respondent pointed it out: that the procedure as set out in R. A. D. 23, Sec. 10 has not been followed. There is no showing that (a) the proposed amendment has been taken before the Disciplinary Commission, or (b) that the Commission has made a determination upon the matter and has directed the filing of an amended complaint at a duly constituted meeting of the Disciplinary Commission. That Respondent knows that he has not been given an opportunity to respond to the proposed amendment prior to any determination by the Disciplinary Commission as is provided in R. A. D. 23, Sec. 10. He also pointed out that there is no section in the rules which permits the Hearing Officer to approve amending of the complaint. The Disciplinary Commission and the Hearing Officer both derive their jurisdction and authority from the above rule, they are required to abide by such rule in order to satisfy requirements as to jurisdiction, notice and due process. In this instance the acts in amending the complaint were beyond jurisdiction, failed to give the required notice as per the above rule, and have denieddue process of
7 & 8-3
law. See Memorandum on Excess Jurisdiction which is attached hereto. See footnotes 7 & 8-4 through 7 & 8-9.

THE HARM: The Amendments it should be recalled relate to the charging as to alleged misconduct which occurred at remote times many years ago. The key witnesses are: The Respondent, Bertha Wolfe, and Mary Bernice Smoker. The Commission took the Deposition of Smoker in 1977 before even the first complaint was filed. (She died in 1979). Briggs took the deposition of Mrs. Bertha Wolfe in 1981. (She is ill and elderly and lives in Arizona). Both the first and second Amended Complaints were made after both of the depositions. Briggs had no right to question these key witnesses after the changed--standard of conduct as proscribed by the third Amended Complaint made in 1984.

Ex. 7 & 8-1: The Motion of Mr. Hughes seeking to amend the complaint was received by the Respondent on or about 6-18-84. It was delivered to the Supreme Court by the Hearing Officer.

Ex. 7 & 8-2: Respondent filed a pleading opposing the motion to amend on 6-22-84. Respondent's motion was delivered to the Supreme Court by the Hearing Officer.

Ex. 7 & 8-3: The memorandum is found on pages 7, 8 and 9 of this Petition for Review.

Ex. 7 & 8-4: The 13th hour amendment of the complaint was made about 6-15-84. The trial began in early 7-84. The amendment denied timely due process notice. Respondent was prevented from adequately preparing for his defense. The amendment caused confusion in the minds of the parties, attorneys, and the Hearing Officer.

Ex. 7 & 8-5: There was a lack of timely due process notice as to which standard, or which test, or which law or which code specifically would be used at the trial.

Ex. 7 & 8-6: Respondent was prevented from cross-examining key witnesses on depositions already taken--Mary Bernice Smoker who was dead at the time of the trial and Bertha Wolfe, who because of illness of herself and her husband could not attend the trial.

Ex. 7 & 8-7: The test or standard, if any clear-cut standard was available, for judging Respondent's acts of so many years ago in the 1960s was so vague, so uncertain, and so lacking as to an ascertainable standard that it falls within the void-for-vagueness doctrine.

Ex. 7 & 8-8: It would have been impossible (as the Hearing Officer says at page 55 under 99) for Respondent to have a "full knowledge of the status of Indiana law applying thereto..." it is doubtful if any person back in 1968 and 70 had such full knowledge. This is so because what ever standard was available was so incapable of definition and was so imprecise as to hardly be useful as a guide for conduct. With this uncertainty, and lack of an ascertainable standard it was impossible for any person to have such full knowledge of the status of Indiana law applying to the situation. The standard was void because of vagueness. The Kutak Commission of the American Bar Association on Evaluation of Professional Standards has determined that even some of the 1971 Disciplinary Rules are incapable of definition, are imprecise and are not useful as a guide for conduct. The void-for-vagueness doctrine is discussed in the case of Kolender v. Lawson (1983) 461 U S 352, 75 L Ed 2d 909, 103 S Ct 1855. The annotation commencing at 75 L Ed 2d 1049 discusses the void-for-vagueness doctrine.

Ex. 7 & 8-9: The arguments advanced that void-for-vagueness standards cause lack of due process notice are as follows:
(A) Such standards trap the innocent by not providing fair warning that certain conduct is proscribed and, such standards allow for arbitrary and discriminatory law enforcement by impermissibly delegating basic policy matters to...judges and others...for resolution on an ad hoc and subjective basis. Where inherently vague statutory language permits such selective enforcement. there is a denial of due process. 75 L Ed 2d 1049, 151, 152. In instances these vague state standards inhibit exercis of first amendment freedoms. See page 1052.

Exception 9. Unnecessary pre-trial punishment.

Respondent excepts to the Hearing Officer's Report in determing that he has not suffered pre-trial unnecessary punishment. Respondent has already suffered such pre-trial punishment and by having suffered such, he has denied due process of law. Under R. A. D. 23, Section 11 (c) there is a provision for filing a motion by the Disiciplinary Commission requesting suspension pending prosecution. No such motion was filed in this matter, but instead without due process of law and without seeking authority under that rule, Respondent has been held cruelly in terrorem for 7 years under the threat that his license might be suspended or revoked. In-depth research has not revealed other disciplinary cases in the United States where a disciplinary proceeding has been pending but delayed for such an extended period without a hearing on the merits. As a result of the problem in our Indiana reporting system of not reporting cases which either have not come to trial or which have been favorable to the Respondent, it is impossible to secure records of Indiana cases of this nature. Respondent has been denied equal protection because other attorneys who are accused are not held for seven years in terrorem. If so, it is impossibile for Respondent to determine under our reporting system. This is a protected right under Section 1, 14th Amendment to the U. S. Constitution. The 7 year delay has resulted in excessive punishment and extraordinary harm to Respondent consisting of mental suffering, pain, anguish, anxiety, fear, loss of confidence, confinement in activities, loss of clients, through publicity, disruption of legal practice, degradation by other attorneys and judgments, physical ailments, loss of family integrity, loss of privacy, loss of consortium and loss of reputation. Being held in terrorem for so long falls squarely within the prohibitions for cruel or unusal punishment for which protection is provided under Amendment 8 to the U.S. Constitution and by Article 1, Sec. 16 of the Indiana Constitution. *See footnote Ex. 9-1, et seq.

Ex. 9-1: See Respondent's pleading and memorandum filed on 5-7-84. The pleading is at page 7 and the Memorandum is at page 45. Both are incorporated herein by reference just the same as if they were copied here in full. The Memorandum commencing at 45 through 48 sets out the special harm which has been done to William J. Briggs and Florence Anne Briggs by the prolongation of these proceedings and the holding of them under the threat of prosecution (in terrorem) for so many years.

Ex. 9-2: See Footnote Ex. 2-6.

Exception 10. Denial of right to compulsory attendance of witness. At the hearing on the merits Respondent was deprived of his right to have compulsory attendance of witnesses under Amendment 6, U. S. Constitution and Indiana Rule for Admission and Discipline No. 23, Sec. 14(b) and (d). Compulsory process to obtain a witness is of no value if the witness is dead, disabled, his whereabouts unknown, or his memory faded due to the delay sanctioned by the Disciplinary Commission. The Respondent was denied his subpoena rights upon the executive secretary, attorney Hughes, and members of the Disciplinary Commission. The subpoenas were quashed as to members of the Commission. The executive secretary and attorney Hughes were permitted to take the stand. The questions which were allowed, and/or to be answered so severely limited the information to be elicited, so as to make the use of the subpoena rights nothing more than superficial. The highly controlled procedure disipated any effective use of subpoena rights. Information sought by Respondent from all of those subpoenaed was: (a) what evidence either for or against William J. Briggs and Florence Anne Briggs was actually presented to the Commission and were the issues as to them ever separated and presented separately? and (b) What evidence either for or against attorney-grievants was actually presented to the Commission? and (c) Were any Constitutional issues such as delay presented to the Commission? Any questions which related to these matters were disallowed. *

* Ex. 10-1. See Respondent's pleading and Memorandum filed on 5-7-84. Pleading at page letter O and Memorandum at page 44.

Ex. 10-2: Because of the rulings of the Hearing Officer sustaining objections to questions directed to Breskow and Hughes at the trial at Rochester, Indiana, and because of the resistance of the Executive Secretary, Sheldon Breskow, and Attorney, David Hughes, to provide information and give testimony thereon, the Respondent was denied the right to obtain testimony and evidence by use of his Constitutionally guaranteed subpoena rights.

Ex. 10-3: Respondent was denied his free speech First Amendment right to appear before the Disciplinary Commission and present political aspects of these proceedings against him and criticism thereof. Respondent was also denied the opportunity to appear before the Disciplinary Commission at a time after the investigation had already focused upon him as to alleged misconduct. He was denied the opportunity to present favorable evidence, matters in mitigation, Constitutional issues, and questions as to motives of the grievants.

Ex. 10-4: The Respondent made his request to appear at the Commission meeting through the Executive Secretary, Sheldon Breskow. The Executive Secretary notified Respondent when he would not be permitted to appear before the Disciplinary Commission by letter on or about July 20, 1983, with reference to August 13, 1982 meeting. However, the Disciplinary Commission did authorize Respondent to appear at its June 13, 1982 meeting. See Exhibit 46. The Executive Secretary did not notify Respondent that he had been granted such permission to appear, and accordingly Respondent did not appear. Later, apparently because of his failure to appear because of lack of notice, the Commission then denied Respondent the right to appear at its July, 1982 meeting and thereafter.

Ex. 10-5: Respondent was denied his subpoena rights as to the Disciplinary Commission members and the right to question Sheldon Breskow and David Hughes--as to the matters set out in footnotes numbered Ex. 10-2; 10-3; 10-4; and including the reasons why he was not given the required due process notice that he had been granted an opportunity to appear at the Disciplinary Commission meeting on June 13, 1982.

Ex. 10-6: Compulsory process to obtain a witness is of no value if the witness is dead or unavailable. In this trial, Offers to Prove were made with reference to numerous witnesses who were dead or unavailable. Tr 171 through 214. The most serious losses came from the absence of Kate Smoker, James Stewart, Ralph Hanna, Clarence Watson, Bertha Wolfe, Victoria Cornell, and the cumulative overall loss of bits and pieces of evidence from various witnesses. Lost evidence via faded memories at this trial is remarkably demonstrated by Sheldon Breskow. (Tr 215-52) Although there is an attempt to turn this so that it is a disadvantage to the Disciplinary Commission, clearly this demonstrates the great loss to the Respondent rather than to the Commission. The defences as to mitigation, early contact with Mr. Marks as a grievant, the difficulty of the Respondents' showing the mental state and attitude of prosecuting authorities were all greatly hampered because of the faded memory of Mr. Breskow, Respondent Briggs, and almost all of the witnesses. It was a distinct disadvantage (in this faded memory area) to William J. Briggs who was required to attempt to recall events in the 1960s (15 to 20 years ago) and in particular, detailed facts surrounding mental state of mind of his client, Kate Smoker, at those times and proof of disclosure in 1968 and 70 before and after. The delay by the Commission in the trial of this case clearly prevented cross-examination of Smoker as to the charge of delay and charge of harassment. These particular charges were not raised until after deposition of Smoker was taken in 1977.

Ex. 10-7: The Respondent was denied his subpoena rights upon members of the Disciplinary Commission--subject to a showing that the Disciplinary Commission had first hand knowledge of facts of misconduct. In other words, a showing had to be made that one of the Disciplinary Commission members could testify that he had personal contact in some way with the Respondent about which he could testify about misconduct. This clearly was erroneous. The thrust of the questions (which would have been propounded to the Disciplinary Commission members had they been permitted to testify) would be what evidence was presented to the Commission. What Commission members were present at the meeting? What was the content in the Official Report of Investigation? What witnesses testified at the Commission meetings? Was a quorum present? Were separate reports made for William J. Briggs and Florence Anne Briggs? Were the issues and alleged misconduct as to the two Respondents ever separated and presented separately? Did the Disciplinary Commission authorize the filing of separate Complaints against Florence Anne Briggs and William J. Briggs or joint Complaints? Did the Commission authorize a joint trial for William J. Briggs and Florence Anne Briggs? What exculpatory evidence was presented, if any, for Florence Anne Briggs or William J. Briggs? Were any of the Constitutional issues such as loss of witnesses, faded memories, delay, and who was responsible for the delay? Were there issues ever presented to the Disciplinary Commission? Was the question of malice of the grievants presented to the Disciplinary Commission? What evidence for or against the grievants was actually presented to the Commission members? Was this case against these Respondents a test case? Was there any disclosure made to the Disciplinary Commission that the charges as filed in the original Complaint in 1978 and the first amended Complaint in 1983 violated the Constitutional mandate against ex post facto rules and laws?

Ex. 10-8: Did the verified Complaint which was filed by the Executive Secretary contain charges or allegations upon which findings of reasonable cause were not found by the Disciplinary Commission? Was a fair presentation of the complex fact situation in the Briggs case presented to the Disciplinary Commission including questions as to malice of grievants, numerous violations of Disciplinary Rules by grievants and questions as to whether the grievance was actually filed for passion, greed, or to gain advantage in civil litigation.

Ex. 10-9: In the transcript of the testimony of Mr. Breskow at Tr 345 and 361 Respondent, Florence Anne Briggs, in questioning the witness inquired as to whether the Disciplinary Commission acts as a rubber stamp for either the Staff Attorney or Executive Secretary and in particular did it act as a rubber stamp in the Briggs case. See Tr 345 line 21 and Tr 361 line 6. The very late case of U. S. v. Leon, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), is directly in point. This case held that its new standard of giving deference to a magistrate is not boundless. It named situations where the deference to the magistrate would apply. In other words, there are exceptions. One is: "If the issuing magistrate wholly abandoned his judicial role and became a rubber stamp for the police." So that this question indeed was relevant because of the test in Leon which focuses on the good faith or bad faith of the police and the prosecutors.

Ex. 10-10: In the Briggs case the Hearing Officer gave an opinion for its decision for denying inquiry with reference to presentation of a summary (Official Report of Investigation by

Executive Secretary) to the Disciplinary Commission--and if these were fairly presented to the Disciplinary Commission. At Tr 361 line 10 the Hearing Officer commences to give his opinion which runs through the following page at line 27. The essence is when he says, "it seems to me that the constitutional scope and purpose of inquiry here is to determine that there is a fundamentally fair mechanism for presenting both sides of the issue to the arbitor and that that mechanism was used in this case...(and he goes on later) it seems to me that ultimately the issue that needs to be preserved is--is the mechanism there for a preliminary hearing..(and he further says) I guess Mr. Briggs' comments a few moments ago has squarely focused in on that as anything I've heard. How can we get behind it and I think my answer is--you can't. Or at least I'm not going to let you." The Court further says at Tr 361 line 22, "...the question was--was it fairly presented in this case? Whether the mechanism is there and accords due process is an entirely different question from--was it fairly done in this case?" Thus the Court has made his position quite clear. The Court (in this case the Hearing Officer) indicated that if a "mechanism" is provided--in this case a Disciplinary Commission meeting--and if the meeting is held by persons who are authorized to act as a Disciplinary Commission and if they authorize the filing of a Complaint, then the Constitutional guarantees have been entirely satisfied. Mr. Hughes argued a position that the Court accepted. On page 350 of the transcript of the testimony of Sheldon Breskow at line 18 he stated, "what they are trying to now litigate is whether the presentation made to the Disciplinary Commission by its staff was constitutionally adequate...." The Judge's position that if a mechanism is provided all constitutional guarantees are satisfied obviously does not take into consideration whether a fair presentation was made to the Disciplinary Commission by the staff. It disregards the spirit of the statute and the rules and leaves them of absolutely no concern. This quite clearly presents the view that it doesn't make any difference if a hearing is meaningful, if it is a rubber stamp procedure, if the prosecutorial authorities are in good faith, if they intentionally omit exculpatory matters. According to judge's view and holding, the only thing that counts is if there was an actual meeting of the Disciplinary Commission at which some kind of action was taken. This position is grossly in error. This fails to take into consideration a host of relevant factors. First off, was there even a quorum present at the Disciplinary Commission meeting? Was there an actual determination made as to whether there was probable cause. In this particular instance, according to the minutes of the meeting held on September 10, 1982, as found in Exhibit B-49 there was a determination that there was reasonable cause (not probable cause) and the Executive Secretary was authorized to file a verified Complaint. There is no record of the meeting showing that the Complaint was prepared in advance of the meeting and presented to the Disciplinary Commission for its approval. In fact just the contrary is true. The minutes of the meeting show that the Complaint was to be prepared after the meeting. No minutes of a later meeting were introduced to show that the Complaint which was filed on July 19, 1983, was approved by the Disciplinary Commission before it was filed. The Executive Secretary, Mr. Breskow, and the Attorney for the Disciplinary Commission, Mr. Hughes, both have confirmed that there was a delay of almost a year from the meeting which authorized the Complaint down to the actual date that the Complaint was filed. (Tr 326, testimony of Breskow line 26). Mr. Hughes says in his testimony that the matter was in his hands from September 1982 until the filing of the Complaint in July of 1983 and it would take me a while to explain what happened during that period." (Tr 481 line 8).

Ex. 10-11: In the Briggs case there is no proof that the Complaint as filed contained the allegations of misconduct upon which reasonable cause findings were made by the Disciplinary Commission.

Ex. 10-12: It is true that the minutes of the meeting indicate that the Disciplinary Commission found "reasonable cause." It did not find "probable cause." This is in accordance with R.A.D. 23, Section 11(b). It is not in accordance with the Constitution of the U. S. and its Amendments which provide that there must be a finding of probable cause--not reasonable cause. Although this proceeding is not strictly criminal, it is more criminal than it is civil and this Respondent believes that the finding of reasonable cause and lack of finding of probable cause is not sufficient to meet Constitutional standards. It is a less stringent test.

Ex. 10-13: Under Amendment 4 of the U. S. Constitution, no warrants can be issued except upon probable cause. This relates to protecting against deprivation of due process rights guaranteed by the 5th Amendment and would certainly include Indiana Constitution Article 1, Section 1 which grants all men life, liberty and pursuit of happiness. A careful reading of the 5th Amendment of the U. S. Constitution indicates that the word warrant is not in that section, yet, persons can not be held to answer for misdemeanors unless there has been a finding of probable cause. The language in the 5th Amendment is: "no person shall be held to answer...". This means "be tried for" to an indictment of a grand jury or affidavit of a prosecutor. Further it would be difficult to argue that Disciplinary Proceedings are less serious than misdemeanors. If a person can not be prosecuted for a misdemeanor, save and except on a finding of probable cause, certainly then a person can not be prosecuted in a Disciplinary Commission save and except upon a finding of probable cause. Therefore, the less stringent finding of "reasonable cause is not sufficient to meet Constitutional standards."

Ex. 10-14: See the section on Harm set out on page 14a of this Petition to Review under exceptions 7 and 8.

Ex. 10-15. A detailed Table of Contents was prepared by William J. Briggs and placed in the record of Volume I as a table of contents for Volumes I, II, and III. The testimony of Sheldon Breskow commences at Volume II page 230 through 420, and the testimony of David Hughes commences at Volume III at page 425 498 and thereafter a small portion of the Final Argument of Mr. Hughes is included. The table of contents for the testimony of Mr. Breskow and Mr. Hughes are incorporated herein as additional footnotes making detailed references to the record for proof of the arguments made herein.

Exception $10_a$. Denial of equal protection.

Respondent is being denied equal protection because he is being denied provileges and immunites under the Disciplinary Rules which are being given to prosecuting-grievants who are lawyers and to attorneys for the Disciplinary Commission, in violation of the preliminary statement of Indiana Code of Professional Responsibility and as guaranteed by Article 1, Sec. 23 of the Indiana Constitution and by Sec. 1 of the 14th Amendment of the U. S. Constitution.

This matter was raised as Issue 5 in Respondent's pleading and memorandum filed herein on May 7, 1984 which is incorporated herein. Those documents set out in detail the exceptional circumstances of this case because of the extraordinary number and seriousness of the violations, (See Ex. 10a-1).

The matter of this being a test case made by the Disciplinary Commission and the selection for arbitrary prosecution is set out/in another portion of this Petition for Review,/however it (at Ex. 10a-2 and Ex. 10a-3) could very well have been included herein. It should be related.

The Hearing Officer's Report contains findings that acts which have been acts of misconduct (of attorney grievants) were described in the evidence. See page 48 at 3rd paragraph.

The Hearing Officer's Report confirms testimony of the Executive Secretary of the Disciplinary Commission -- that the Commission does not commence grievance or investigation except after some one else has filed a grievance. /However there would be little (See Ex. 10a-4) opportunity to disprove such policy not found in any rule, especially with,as the Hearing Officer says at page 53,our (Indiana) present reporting methods of publishing only those cases where misconduct is found. Policy is not written down, so it could not be found and discovered. See footnote Ex. 10a-1, et. seq.

Ex. 10a-1. See Respondents pleading and memorandum filed on 5-7-84. Pleading at page K and memorandum at page 26.

Ex. 10a-2. In the testimony of Joseph T. Ives, Jr., an Attorney at Delphi, Indiana, he indicates that he had a conversation with Mr. Copenhaver, who at one time was a Staff Attorney for the Disciplinary Commission. The case had been assigned at first to Mr. Copenhaver according to testimony of David Hughes in the record. In the testimony of Mr. Ives at Tr 102, beginning at line 7 and throughout the rest of the page, Mr. Ives confirms that Copenhaver indicated that this was to be a test case. Mr. Ives kept a memorandum as to his conversation. In substance Copenhaver said, "this was going to be a test case to see just how far an attorney had to go to throw somebody out of his office that wanted to make a Will in that particular office."

Ex. 10a-3. This matter is discussed under Exception 14. The legal objection is that prosecution for a test case would amount to selection for arbitrary enforcement which is an unconstitutional motive. This indicates that the Disciplinary Commission knew that there was a lack of an ascertainable standard which left this Respondent, William J. Briggs, as well as other Respondents with an uncertain standard for conduct and accordingly failed to give the required due process notice. Under these circumstances, William J. Briggs could not be charged with knowledge of Indiana Law applying to that situation (which wanted to be tested by Copenhaver and the Disciplinary Commission). Accordingly, this test case amounts to selection for arbitrary enforcement.

Ex. 10a-4. The denial of use of subpoena rights and limitation of questions of those subpoened (as is fully discussed under exception 10 and its footnotes)denied the Respondent the right to make a showing to the hearing officer and denied Respondent the right to make an adequate record for appeal on the issues of (1) arbitrary selection for prosecution, and (2) selective prosecution, (3) lack of uniformity in the treatment of members of the bar by the Executive Secretary, staff attorneys for the Commission and ultimately by the Commission itself(4) the unwritten customary procedure or policy of the Executive Secretary by whim (5)favored treatment of attorney grievants and (6) position of the attorneys for the Commission, Executive Secretary and the Commission itself that it is not subject to the Code of Professional Responsability and that prosecution of Respondents must be in accordance with the Rules for Admission and Discipline and the Constitutions of the State of Indiana and the United States, and numerous other issues. Although the witnesses Breskow and Hughes professed their desire to provide constitutional hearings, the resistance to providing facts to support same indicates otherwise.

PREFACE TO ---------PARTICULARIZED EXCEPTIONS

Because of the volume and complexity of these proceedings, a serious attempt has been made to limit this Petition for Review to matters of more than peripheral significance. Unfortunately there are a great many factual inaccuracies and omssions with more than peripherical significance which Respondent has not been able to raise. This limitation has been imposed, not only by the short span of time from Hearing Officer's Report to due date, but also so as not to widen the sope of the review and because of lack of funds with which to provide the additional transcript and record.

Exception 11. Particularized exceptions--right to defend himself --right to free speech--right to redress for grievance.

Respondent excepts to the Hearing Officer's Report as follows: The Report recommends disciplining Respondent for alleged professional misconduct as a lawyer for actions which he took in defending himself and his rights as a private citizen against litigation charging him with misconduct filed against him by his former (not at the time) client who had discharged him and employed other attorneys. Ex. 11-1 The Respondent, not as a lawyer but a private citizen, in seeking to defend himself was using his right of redress and his right to freedom of speech in speaking out orally and by pleadings by which he critized the other actors, and the system which frustrated the use of his right of redress and right to free speech.

At page 56, paragraph 106 the Report says: Ex. 11-2 except for preparation of the Will until client sought other counsel, Respondent's conduct was appropriate which indicates an attempt to discipline for actions which Respondent took as a private citizen after he had been discharged by Smoker as her attorney.

Here follows information as to the underlying basis, justification, and mitigation for actions taken by Respondent after his client discharged him and almost immediately began Court litigation against him.

Before the filing by Marks and Power (for Smoker) of the Petition to Remove on Ex. 11-3 2/14/77, Briggs had offered to resign in person to Smoker as he drove her back from the hearing at Delphi on Ex. 11-4 1/13/77 and again by letter the next day on Ex. 11-5 1/14/77. Again on Sunday, 2/6/77, he offered to resign when Smoker and Briggs went to Kokomo together to see a mutual friend at nursing home. Ex. 11-6 He again offered to resign by way of taped telephone conversation on 2/7/77 which telephone conversation was taped by tenant Unger, unknown to Briggs, but is in evidence in this case. Ex. 11-7 The taped conversation was played to Smoker on at least two occasions, 2/7/77 and again on Ex. 11-8 2/11/77. Briggs and Smoker talked on the evening of Ex. 11-9 2/9/77 and again as she had at all times before,

insisted and begged him not to resign until she could get a doctor who would say she was competent because she wanted the guardianship terminated. Briggs promised Smoker he would wait, and not resign, and he promised to file a Petition to Terminate when she told him about a doctor's report. Ex. 11-10 The Hearing Officer's Report accurately states that Briggs felt that Smoker had deceived him by not revealing to him sooner her visits to the doctors who found her competent. Ex. 11-11 The report omits to set out the far larger deceit by Smoker, Marks and Power. Smoker induced Briggs to wait and not resign in reliance upon her promise that she would tell him when she could get (Dr. Wagoner) to change his diagnosis Ex. 11-12 or (some doctor to find her competent). Ex. 11-13 Smoker, Marks and Power kept the doctor's findings a secret from Briggs Ex. 11-14 which was a misrepresentation of a material fact upon which he relied which has caused him irreparable harm for the remainder of his life. Ex. 11-15 In place of keeping the promise so that he could resign or file a Peition to Terminate based upon competency, Marks and Power for Smoker filed a Petition to Remove. Ex. 11-16 Smoker began litigation against Respondent in the following particulars: Marks and Power filed Petition to Remove Briggs maliciously attacking his character, containing misstatements and false statements Ex. 11-17 violating their duties as lawyers under Indiana Code 34-1-60-4. The Petition was not signed by the client but only by Marks and Power. Ex. 11-18 It was in affidavit form Exhibit P-27 sworn to before a Notary Public and contained perjured statements in violation of IC 35-44-2-1 and Indiana Trial Rule 11. Ex. 11-19 Rather than attempting to arrive at a solution to keep their client out of Court, Ex. 11-20 Marks and Power for wrongful motives of passion and self-interest, in violation of R.A.D. 23, Sec. 20, recklessly rushed their client into litigation as a first rather than last resort Ex. 11-21 and filed a Petition to Remove containing "fighting words" Ex. 11-22 calculated to injure the reputation of William J. Briggs and intended to provoke Ex. 11-23 the maligned attorney Briggs into defending himself Ex. 11-24 in violation of D.R. 7-102 because Marks and Power knew that such action would serve to harass or

maliciously injure Briggs. Ex. 11-25 & 25a The petition was filed in bad faith because Marks and Power knew, or should have known, that the maligned attorney Briggs had offered to resign Ex. 11-26 Ex. 11-27 and that they and their client had concealed from Briggs (had not notified Briggs) that they had reports from three doctors finding her to be competent which was evidence to terminate the Conservatorship Ex. 11-28 and that the Petition to Remove was totally unnecessary Ex. 11-29 to accomplish the goal of Smoker (Termination of guardianship). Ex. 11-30 The alternatives of Marks and Power at the time they filed the Petition to Remove were as follows:

(1) Accept offer of Briggs to resign, Ex. 11-31 or

(2) Advise Briggs they had competency findings from doctors, Ex. 11- or

(3) File Petition to Terminate based upon Competency, Ex. 11-33 or

(4) File Petition to Remove in the language of statute without containing fighting words and without damage to reputation of Briggs, Ex. 11-34 or

(5) File Petition to Remove containing fighting words provoking a Courtroom conflict. Ex. 11-35 & 36

Marks and Power chose number (5) which shows bad faith and that they unlawfully advanced a fact prejudicial to the honor or reputation of a party in violation of IC 34-1-60-4 (duty of attorney). In addition, Marks and Power violated D.R. 7-101(A)(1) when they filed Petition to Remove (to continue guardianship) rather than Petition to Terminate and by so doing they failed to seek the lawful objective of Mary Bernice Smoker which was to terminate the conservatorship.

Citations to Footnotes

For the Petition to Review of William J. Briggs

Disciplinary Commission Exhibits are listed as #P

Florence Anne Briggs Exhibits are listed as -- #A

William J. Briggs Exhibits are listed as ----- #B

Calendars for 1976 and 1977 are: Attachments X & Y

All Exhibits and Evidence were delivered to the Supreme Court by the Hearing Officer.

**TESTIMONY OF WILLIAM J. BRIGGS AT TR 140 through 152**

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Ex. 11-1: At the time Smoker commenced litigation against Briggs on 2-14-77, this obviously was Smoker's act of discharge of Briggs as her attorney. Petition to Removes is: Exhibit P-27.

Ex. 11-2: The Hearing Officer's Report by Judge Douglas Morton was filed with the Supreme Court on 1-18-85 and was supplemented on January 23, 1985. Unless designated otherwise, references are to the report filed on January 18. The reference here is to page 56 at paragraph 106.

Ex. 11-3: The Petition to Remove is found at Exhibit P-27. It was signed by Marks and Power (not by Smoker) on Monday, 2-14-77, (and not on 2-16-77) as the docket sheet shows. Docket sheet is Exhibit P-72. Marks and Power signed before a notary public in Delphi (seat of the Court) rather than in Frankfort where they live. The notary public had been the long-time employee of the law firm of which Jeffrey Smith and James Huffer were members. Smith was the Judge Pro Tem for this case at the time. James Huffer was an attorney-grievant of this case. Attorneys in the guardianship case have always treated Monday, 2-14-77, as the date the Petition to Remove was filed in the Carroll Circuit Court. Smith and Huffer are law partners. The Petition was filed with Smith in his office on 2-14-77 but was not entered on the docket sheet until 2-16-77. The notary public was Martha Henderson.

Ex. 11-4: Briggs offered to resign in person to Smoker as he drove her back from the guardianship hearing held at Delphi on 1-13-77 (Thursday). See transcript of testimony of William J. Briggs at Rochester in 1078-S-235 on 7-31-84, part 1, pages 2 and 3 particularly page 3, line 11. The Hearing Officer's Report states at page 12, paragraph 21, that Smoker advised the Court in Respondent's presence that she did not want Respondent taking care of her as a conservator...that she did not want any conservator.

Ex. 11-5: The letter of resignation of 2-14-77 written by Briggs to Smoker is found at Exhibit A-40. Also see testimony of Briggs at Rochester on 7-31-84, part 1, page 2, line 10, 11, 12, and page 3, lines 15 and 16.

Ex. 11-6. Briggs offered to resign on 2-3-77 in favor of Bobby Ritchey. See Hearing Officer's Report page 14, paragraph 25. Briggs offered to resign in person to Smoker when Briggs and Smoker on 2-6-77 (Sunday) drove together to Kokomo to see their mutual friend, Elmer Milburn, who was in a nursing home there.

continuation of footnote 6

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See testimony of Briggs at Rochester on 7-31-84, part 1, page 4, line 22 through page 5, line 5. The Hearing Officer's Report of this is at page 15, paragraph 28, and is not accurate. At no time did she indicate she was looking for a successor guardian. She asked Briggs not to resign until she could be found competent.

Ex. 11-7: On 2-7-77 Ronald Unger, Smoker's former tenant, called William J. Briggs on the telephone and unknown to Briggs taped the conversation. Transcript of testimony of William J. Briggs at Rochester on 7-31-84, part 1, lines 13, 14, 15 and part 2, page 3, lines 9 through 14. The tape is in evidence at Exhibit B-27 and the typed transcript of the tape is Exhibit B-28. The offer is to resign in favor of a bank. See third from last page of Exhibit B-27. Start 6 lines from the bottom of the page and continue on the next page for one-half of that page.

Ex. 11-8: The taped conversation was played for Smoker on 2-7-77 on the same date that it was made and on Friday, 2-11-77, on the same date that Smoker visited the Briggs office two times when she came there uninvited by her own volition. Testimony of Briggs at Rochester, part 2, page 3, lines 3 through 19. Also see part 1, page 6, lines 4 through 19. Smoker admitted that Unger made the tape and played it for her. See the Disciplinary Disposition of Smoker taken 11-22-77, page 22, at 513 through line 516.

Ex. 11-9: Briggs and Smoker talked on 2-9-77 (Wednesday evening) after a meeting at the town hall in Burlington which is just across the street from Smoker's house. Testimony of Briggs at Rochester on 7-31-84, part 1, page 4, lines 8 through 21. The Hearing Officer Reports this at page 15, paragraph 30.

Ex. 11-10: See footnote 9.

Ex. 11-11: Hearing Officer's Report, page 18, first paragraph.

Ex. 11-12: The mis-diagnosis by Dr. Don Wagoner as to Smoker's condition is recognized by the Hearing Officer in his Report at page 15, last line of paragraph 28. This mis-diagnosis of Dr. Wagoner was relied upon by Respondent. While Smoker was in the hospital in Kokomo, Dr. Wagoner told Briggs that Smoker's arteriosclerosis was so severe that it was irreversible, and again on 1-13-77 in Court Dr. Wagoner testified that she was legally incompetent--that her recovery was only temporary. See Hearing Officer's Report, page 21, paragraph 21. By February 11th, Dr. Wagoner was forced to change his mind, but the unusual part is his reliance on his examination before 1-13-77 for his 2-11-77 report to say she was now competent. This mis-diagnosis, upon which Respondent Briggs relied, is further supported by the testimony of Dr. John Russell, a neurosurgeon of Indianapolis, who examined Smoker on or about 11-16-84. The record of his testimony at the Guardianship trial was admitted into evidence at this hearing. Apparently Judge Morton overlooked this testimony. Dr. Russell did not find that Smoker was incompetent or that in the future she would not be able to manage her own affairs. This doctor gave her a rather good report.

Ex. 11-13: By 2-9-84, at the time when Smoker induced Briggs not to resign, she had already been examined by Dr. Beardsley on 2-9-77 and Dr. Bowman on 2-7-77 and by Friday, 2-11-77, she had been re-examined by Dr. Wagoner. All had said she was capable of managing her own affairs. The written reports of the doctors are found at Exhibits P-5, 6 and 7. The Hearing Officer's Report at page 14, paragraph 27 discusses these matters.

Ex. 11-14: The first knowledge that Briggs had that Smoker had been examined by doctors, who had found her to be competent, was in the Petition to Remove which set out these facts in paragraphs 12 and 13. The Hearing Officer's Report at page 14, last line on the page says, "both doctors made their results known to Marks." At page 15, paragraph 29, the Report states, "...the best evidence would seem to indicate that she (Smoker) did not inform him (Briggs) concerning the doctors." Respondent agrees with these facts.

Ex. 11-15: These facts fit the classic example of fraud and contain all of the elements present for the historical definition of fraud. The remainder of this exception 11 further explains with facts--the elements for fraud in this situation: the promise, the inducement, the reliance, the misrepresentation, and the harm.

Ex. 11-16: Marks and Power, in the Petition to Remove, did not seek to terminate the guardianship (as they could upon doctor's reports showing competency), but rather they sought a successor guardian. This was not Smoker's goal. See Hearing Officer's Report at page 12, paragraph 21, and at page 14, paragraph 26. Smoker's goal was to terminate the guardianship.

Ex. 11-17: Some misstatements in the Petition to Remove are set out here. The Petition to Remove is at Exhibit P-27.

Misstatement in Petition to Remove #A: Clause 9 says that the guardian did not reveal in his pleading the amount of personal property of which he was taking possession and only gave bond for $10,000.00. 9(a) states that a petitioner has just been informed that guardian filed an additional bond of $90,000.00 on 2-9-77 after Smoker had engaged an attorney.

Response #A: The implications of paragraphs 9 and 9(a) are almost overwhelming. This was not only misleading but was a false statement. Briggs was not appointed permanent conservator until 1-13-77 at which time the Court Ordered him to file an inventory by 2-13-77. The inventory was filed by the conservator on 2-4-77 (Friday), which was ten (10) days before the Petition to Discharge was filed. It was all a matter of public record for Marks and Power to see which they did not look at. By the next Tuesday (2-8-77) Briggs had posted the additional bond which was six (6) days before the Petition to Discharge was filed. The Petition to Discharge, Exhibit P-27 at page 1, paragraph 6, admits that Briggs did not know until 2-10-77 about Marks and Power. The date is accurate.

Misstatement in Petition to Remove #B: In Clause 4 it states, "...(he) is attempting to compel Mr. Unger to rent the farm on a cash basis" and at Clause 5 it states, "William J. Briggs is threatening to plow up land which has always been kept in permanent pasture and which would be subject to rapid erosion and severe loss if plowed." and in Clause 6, it states, "that he had refused to carry forward the plan of crop rotation which this Petitioner had established over a period of years."

Response #B: Respondent agrees with most if not all of the facts set out on page 10, paragraph 17(in three parts).* On the other hand, Marks, Power and Smoker all knew that Briggs was not attempting to compel Mr. Unger to rent the farm on a cash basis, and that he was not threatening to plow up the land, and he was not refusing to carry

*The Hearing Officer's Report.

continuation of footnote 17
Response #B:

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forward a plan of crop rotation. It is true as the Hearing Officer's Report says at page 12 in paragraph 20 that, "she became aware of the guardianship, the restraints it placed upon her ability to do business, and the altered farm management goals." But she also heard Judge Smock tell her in the presence of the Respondent, that "Respondent would try to follow her desires with respect to handling of her farming and other affairs". See page 12, paragraph 21. She also knew that the guardian, while she was ill, had negotiated a cash farm lease for a portion of her farms without her consultation. See page 12, paragraph 22. However, she also knew because she had heard the telephone taped conversation between Unger and Briggs, that Briggs wanted to sit down with Smoker, Unger and himself and enter into a written farm lease which was agreeable to Smoker and Unger. See footnote 7 above. This conversation was played for Smoker on 2-7-77 which was a week before the Petition to Remove was filed on 2-14-77. It was played again for her on 2-11-77 which was on Friday, which was before Monday when the Petition to Remove was filed. In the testimony of Briggs at Rochester at part 1, page 6, lines 15 through 28, there is testimony that Smoker gave Briggs the details*for preparing a crop share lease on a fifty-fifty basis on 2-11-77 (Friday) to be signed on Saturday. In addition, Mr. Unger, the tenant, had a specific understanding that the cash rent lease could never be effective unless it were approved by the Carroll Circuit Court and he knew that the lease had never been taken to the Court for approval. See testimony of Briggs at Rochester part 2, page 2, lines 5. Mr. Unger, himself, had taped the conversation with Briggs and had taken the tape and played it for Smoker. He knew all the facts and presented them to Smoker before 2-14-77.

Ex. 11-18: See Exhibit P-27.

Ex. 11-19: Trial Rule 11 provides for a verification of pleadings and says, "any person who falsifies an affirmation or representation of fact shall be subject to the same penalties as are prescribed by law for the making of a false affidavit."

Ex. 11-20: No mention was made in the Petition to Remove that the guardian had offered to resign, nor was there any attempt whatsoever by Marks, Power or Smoker to take Briggs up on his offer to resign.

Ex. 11-21: I. C. 29-1-18-25 provides: A guardian may be removed in the same manner as a personal representative under I.C. 29-1-10-6, which provides that <u>in case of emergency a (guardian) personal representative can be removed instantly without notice or citation</u>. There was no such allegation of an emergency or a request for the instant removal of Briggs in the Petition and at no time thereafter did Marks and Power ever file a pleading with the Court alleging an emergency. Even though the statute allows the Judge to remove the guardian on his own motion, Judge Munro did not treat it as an emergency as he could have under the statute.

Ex. 11-22: Fighting words. Free expression may be protected in a free society under the 1st Amendment to the U. S. Constitution. In addition, Indiana has determined that words in pleadings, no matter how reckless or false, are privileged in libel suits if those words are relevant and pertinent. However, these same words are not necessarily protected in disciplinary proceedings. See 87 ALR 3d 353 <u>et. seq.</u>. There is no doubt that some free expression in pleadings can pose a disservice to society and to the public and to members of the bar.

continuation of footnote 22

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Under a decision of the U. S. Supreme Court, there are classes of words called "fighting words" which are not protected by the 1st Amendment. Fighting words are ostracized because they are socially useless and any benefit that may be derived from them is clearly outweighed by the societal interest in order and morality. Under Chaplinsky v. New Hampshire (1942) 315 US 572, 62 S.Ct. 769, the U. S. Supreme Court has recognized "fighting words" which are not protected. These words by their very utterance inflict injury or tend to incite an immediate breach of peace. Indiana has recognized that certain words which are of sufficient intensity to be likely to provoke a violent reaction fall within the fighting words exception to the right of freedom of speech. See Mesarosh v. State (1984) Ind.App., 459 NE 2d 426, at 425 indicates that the scope of the "fighting words" exception was summarized by the Supreme Judicial Court of Massachusetts in Commonwealth v. A Juvenile, (1975) 368 Mass. 580, 591, 334 NE 2d 617, 624-5. "Fighting words as referred to in the relevant constitutional decisions are limited to 'those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.' Chaplinsky v. New Hampshire, (1942) 315 US at 572, 62 S.Ct. at 769. The words must be 'personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.' Cohen v. California, (1971) 403 US 15, 20, 91 S.Ct. 1780, 1785 (29 L.Ed.2d 284).... In order to be personally abusive the words must be 'directed to the person of the hearer' in the sense that they are a face to face personal insult. Cantwell v. Connecticut, (1940) 310 US 296, 309, 60 S.Ct. 900, 906 (84 L.Ed. 1213).... Finally, the determination of whether words are personally abusive may not rest on subjective perceptions since 'an undifferentiated fear or apprehension is not enough to overcome the right to freedom of expression.' Tinker v. Des Moines Independent Community School Dist., (1969) 393 US 503, 508, 89 S.Ct. 733, 737 (21 L.Ed.2d 731)...."

Ex. 11-23: Conclusion: the thrust of the doctrine has become whether, under an objective standard, the words were stated as a personal insult to the hearer (reader) in language inherently likely to provoke a violent reaction.

Ex. 11-24: The Hearing Officer states at page 18 (at the top of the page) "his reaction as he described it when reading the Petition was as if someone had 'taken a strap and belted him in the face' and that he felt required to oppose and fight the allegations against him because of their nature."

Ex. 11-25: Marks and Power did not write the Petition to Remove in the language of the statute but dealt in verbal abuse (which according to 87 ALR 3d 353) means written aspersions of the character, reputation, or conduct of another attorney. Even though pleadings containing verbal abuse may be privileged (because they are relevant and pertinent) in a libel suit, they still may be considered as meriting disciplinary action. The material issue as to verbal abuse in a disbarment proceeding against Marks and Power would be--the falsity of the statement and the intent with which they were made, regardless of the question of privilege in a libel suit.

Ex. 11-25a: This is the law in Indiana as stated by this Court (Supreme Court of Indiana). "...a legal proceeding is not a vehicle for personal vilification and when a lawyer's decisions, pleadings and practise develop into tools for self-interest, he ceases to be a zealous advocate. A lawyer at this stage become an impediment to the practise of law and violates the Code of Professional Responsibility." Matter of Crumpacker (1978) Sup.Ct., 383 N.E.2d 36.

Ex. 11-26. In Loza v. State (1975) Sup.Ct., 325 NE 2d 173, at 179 states, "clearly a deliberate misleading of the Court upon factual matters is misconduct demanding severe disciplinary action. Honest errors and oversights are understandable and tolerable, but when numerous representations of facts prove to be inaccurate, we are justified if we question the proponent's good faith."

Ex. 11-27: See footnotes 11-4, 11-5, 11-6, 11-7 and 11-8.

Ex. 11-28: See footnotes 11-13 and 11-14.

Ex. 11-29: The Petition to Remove was unnecessary for two reasons. The guardian had offered to resign, and the ward had been declared competent. In the guardianship trial, Judge Munro's reaction was exactly this in his ORDER (Exhibit A-52 herein) entered about 4-13-79 when he said, "Assuming this allegation to be true, (that prior to the filing of the ward's Petition to Remove, Conservator had offered to resign and permit a successor conservator to be appointed and that the ward had refused his offer) then the Petition to Remove the Conservator was completely unnecessary and could hardly be found to be relevant and pertinent to any issue." The issue in the guardianship was a claim for libel. The question was: was the entire pleading (Petition to Remove) relevant and pertinent in the libel claim. At a later time, Judge Munro partially reversed himself by finding that a Petition to Remove did not have to be necessary in order to be relevant and pertinent as to a claim for libel. However, at no time did Judge Munro ever indicate that he had changed his original thought that the Petition to Remove was completely unnecessary.

Ex. 11-30: It can not be overlooked that Marks and Power (as lawyers) knew that if they filed a Petition to Terminate based upon competency, then they would be prevented from alleging facts damaging to the reputation of the guardian. Such facts would not be relevant and pertinent to the issue of competency. See footnote 11-16.

Ex. 11-31: Neither Smoker, Marks nor Power made any effort whatsoever to take Briggs up on his numerious offers to resign.

Ex. 11-32: Smoker, Marks and Power all concealed the competency findings from Briggs.

Ex. 11-33: Marks and Power did not seek to terminate but asked for a successor guardian.

Ex. 11-34: Indiana Code 29-1-10-6 which sets up the right to file a Petition to Remove actually sets up a "show cause" type petition and does not require detailed allegations which would damage a person's reputation.

Ex. 11-35: It will be argued that the wrongful actions of Marks, Powe and Smoker do not provide a defense or justification for the alleged wrongful actions of Respondent. However, the extraordinary facts an circumstances of this case require closer examination. The Petition to Remove (also a long pleading, Exhibit B-5, filed on 7-14-77 in the guardianship which were found by Judge Munro to be libelous) wer filed in bad faith, with malice, and constitute fraudulent misrepresentation because: (1) Since the guardian had offered to resign, i was not necessary to file any Petition or commence any litigation against Briggs to terminate the guardianship. (2) Marks and Power knew they could file a Petition to Terminate the guardianship becaus the ward had been examined and found competent. (3) The Petition t Remove could have been filed in the language of the statute without harm to reputation of Respondent. (4) Smoker (and Marks and Power) did not accept Respondent's offer to resign but Smoker played on his sympathy and long-standing friendship and induced him not to resign until she could get a doctor to find her competent at which time she promised to tell Respondent so he could file a Petition to Terminate (5) Respondent in reliance upon Smoker's misrepresentation did not resign. (6) Rather than notifying Briggs of the finding of competency, they concealed the doctors' reports from Briggs. (7) Rather than accepting his offer to resign, they filed the Petition to Remove and commenced litigation against him. Marks and Power knew that Respondent had been deceived, and that the pleading was misleading and that the facts had been distorted and falsified. Marks and Power knew that the normal reaction of a reasonable and prudent man would be to defend himself against such deceit and fraud or to seek to have the pleading withdrawn. Because the Respondent reacted in this fashion, he has now been charged with misconduct. The extraordinary facts and circumstances of this case should not be overlooked. The inequity of the treatment of Respondent and the vastly different treatment of Marks and Power by the Disciplinary Commission (which has had knowledge of the facts for so long) is obvious. The inequity should be rectified.

Exception 12. Particularized exceptions surrounding Smoker's Will.

Respondent excepts to the Hearing Officer's Report which proposes discipline for Respondent's actions in drafting a 1970 will and advising his client thereon when his family were substantial beneficiaries as such or under a trust created therein and findings in the Report at page 55 at 97 that Respondent violated Canon 6 of the Code of Professional Ethics of the American Bar Association -- in that his professional judgment on behalf of his client may reasonably have been affected by his own financial business, property, or personal interest and to such a degree as to impair his independent professional judgment, and at page 55 under 99 that Respondent violated Canons 6 and 37 of the same code -- with knowledge of the status of Indiana law applying thereto, Respondent invited a future will contest and thereby intentionally failed to seek the lawful and appropriate objective of his client.

The first basis is: Even if it could be said that Respondent acted with full knowledge of Indiana Law (which is not accurate) Respondent did not violate Canons 6 and 37 as alleged in the report for the following reasons:

Bertha Wolfe's deposition: It was admitted into evidence in this
Ex. 12-1a cause, and there is testimony of Respondent and/or Anne Briggs as to the high value of the personal appearance of this witness, why she could not travel to Indiana because of her health and that of her
Ex. 12-2a husband. She is an exceptionally trustworthy person, gives the appearance of being believable and her personal appearance at this trial was a serious loss to Respondent, not only as to the above but as to the matter brought out by prosecution for which no deposition questions were available. Her deposition reveals motives and actions both of Briggs and Smoker as to bequests, trusts, tax considerations, advice of Briggs to Smoker, and in particular, that Smoker was advised by

Briggs prior to the preparation of the 1968 Will that she should see Ex. 12-3a
another lawyer for preparation of that Will. Brigge prepared the Ex. 12-4a
1968 and 1970 Wills. The 1970 Will was a supplement to the 1968 Will Ex. 12-5a
with a few changes made at Smoker's request. Therefore, it is inaccurate to state that Smoker was not advised by Briggs to see another Ex. 12-6a Ex. 12-7a
lawyer before preparation of the 1970 Will. The deposition of Wolfe in this case shows that Smoker's memory for exact details as to prepa- Ex. 12-8a
ration of the Will is not always accurate and that she could not remember whether it was days, weeks or months later or before something Ex. 12-9a
happened. The deposition of Bertha Wolfe shows that she had an excellent memory, certainly better than most persons, for remembering past events. She remembers at page 28, line 22 through 28 that he insisted that she see another lawyer prior to preparation of the Will. Also see cross-examination of the same deposition at page 60, lines 18 through 28 where Briggs advised her(before preparation of Will) that she should see another lawyer. The H.O. Report omits to show that long ago in Briggs' office Mrs. Wolfe took dictation by hand rather than by machine in the presence of a witness (Smoker) and that she was present during much of the conversation between Briggs and Ex. 12-10a
Smoker at the time the Will was prepared. That the Wills were writ- Ex. 12-11a
ten and re-written many times; that Smoker took them home and read Ex. 12-12a
them over carefully. Wolfe deposition page 15, line 18 through page 17, line 4 shows manner of taking dictation in presence of Ex. 12-13a
Smoker and Briggs. The deposition at page 18, 22 through 30 shows that the Wills were typed and re-typed many times before Ex. 12-14a
she signed them. Page 19, line 16 through page 21, line 19 goes Ex. 12-15a
into great detail about the creation of the trust, whose idea the Ex. 12-16a
original trust was; that the idea of naming the son of Briggs was Ex. 12-17a ed
the sole idea of Smoker; that Briggs insist/that she not name his Ex. 12-18a
son unless she was absolutely sure; that the idea of creating a trust came up first and that the idea of naming a particular per- Ex. 12-19a
son came up later, all of which was her idea and not his; insistence by him that she see another lawyer beforehand, page 28, line

Ex. 12-20a
22 through 28; setting up the trust is again discussed at page 20,
Ex. 12-21a
line 23 through page 21, line 19; the general procedure of dictation in the presence of Smoker, and retyping is again discussed at
Ex. 12-22a
page 54, line 12 and ending at page 55, line 6; advice as to seeing
Ex. 12-23a
another lawyer is discussed at page 60, line 18 through 28, this being before the Wills were prepared; the Will was not signed in the presence of Briggs as shown at page 60, line 29 through page 61,
Ex. 12-24a
line 20, and that she had the final draft in her hands at her home
Ex. 12-25a
before she came back to the Briggs office to sign same. The H.O.
Ex. 12-26a
Report does not reflect and should be corrected to show that Smoker
Ex. 12-27a
was advised to see another lawyer before the 1968 Will was made; that
Ex. 12-
preparation of this Will extended over a considerable length of time; that there was no rush or hurry about the preparation of the Wills
Ex. 12-29a
or that she was pushed into signing same or that the bequest to Briggs or any favoritism to his family was not done because of influ-
Ex. 12-30a
ence of Briggs; the report does not reflect time spent in careful preparation of the Wills to tailor them to the exact demands and de-
Ex. 12-31a
sires of Smoker; the report should be corrected to show that Smoker, in herself, was an exceptional person in that she in the manner which she made her past Wills and her demands upon Briggs to draft these
Ex. 12-32a
Wills as to her peculiar if not eccentric wishes; the report does not show that the favorable changes in the 1970 Will were at the specific instance of Smoker after she reflected that she might "not" be dead at the time Winston (son) had reached college age. This is reflected in Smoker's deposition at page 16, commencing with
Ex. 12-33a
question 66 and ending on page 17 her answer continues. This shows that she was thinkimg "in case I live longer than I expect.....
if he graduates and wants to go to college while I'm still living, I want him to have the amount of money that he would have had, had I died." The only persons who knew the details about preparation of the 1968 and 1970 Wills were Kate Smoker, Bertha Wolfe, and William Briggs. Two of these key witnesses were prevented from appearing at this trial because of the delay in the conduct of these pro-

Ex. 12-34a
ceedings by the Disciplinary Commission. Both complaints as filed in 1977 and in 1983 refer to Disciplinary Rules which had not been adopted in 1968 and 1970 and are subject to the ex post facto objection. The complaint was not amended until just a very few days before hearing in 1984. The canons approach this matter in a much different light than the Disciplinary Rules. The Respondent was not permitted because of the death of Smoker and the illness of Bertha Wolfe to examine them after the first and second amended complaints were filed.

Ex. 12-35a
Ex. 12-36a
Ex. 12-37a
Ex. 12-38a
Ex. 12-39a
Ex. 12-40a
Ex. 12-41a

In the deposition of Smoker taken by the Disciplinary Commission, Smoker says that Briggs told her later she should go to another lawyer "because he was in it." A careful reading of the deposition will reveal that Smoker had forgotten the making of the 1968 will which contained similar benefits to the 1970. She seemed to remember the 1967 and 1970 wills. When this is read in conjunction with the testimony of Bertha Wolfe in her deposition it seems Smoker forgot that he told her to go to another lawyer before making the 1968 will. She remembered that he told her later (which is likely to be after 1968 and before 1970). Even if it were true that he only directed her to go to another lawyer after she made her will, she refused to do so commencing from 1968-1970 clear up to the time of the deposition in 1977. Nothing prevented her from doing so during this period.

Ex. 12-42
Ex. 12-43a
Ex. 12-44a
Ex. 12-45a
Ex. 12-46a

At Page 33, Paragraph 64 as to Cannon 6 the Report sets out in paragraph 2 thereof and underlines: "It is unprofessional to represent conflicting interests,...." He failed to underline "except by express consent of all concerned given after a full disclosure of the facts." Undue emphasis is placed upon the first part without including the second part of that same sentence. Briggs did fully disclose the facts to Smoker and in particular:

(1) Respondent made full disclosure to Smoker that Briggs and his family would have an interest in her estate by being named beneficiaries in her Will and that his employment was undertaken with her full consent.

(a) Testimony of Bill. Ex. 12-47a

(b) Deposition of Smoker. Ex. 12-48a

(c) Holographic statement of Smoker. Ex. 12-49a

(2) Smoker was aware that interested parties could contest a Will.

(a) Testimony of Bill showed he and Smoker had discussed the Ella Bell, Emma Harness and Billings estate litigation as to whether father of deceased infant was an interested party. Ex. 12-50a

(b) Smoker obtained Addie Peters as a witness in the Bell Will contest. Ex. 12-51a

(c) Smoker feared that her brother-in-law, Roy Unger (because of her sister's deceased infant) would be an interested party and claim a share of her estate. (Clause 1, Exhibit B-13). Ex. 12-52a

(3) Smoker knew that a person under a guardianship could make a Will.

(a) Ella Bell, under a guardianship, made a Will in her late 90's; died at age 104; Anne defended the Will and won thru the Court of Appeals of Indiana. Ex. 12-53a

(4) The holographic statement of Smoker is set out in the Report at Page 5, Paragraph 7. It shows it was made by her at the time she executed her Will on 2/24/70 and both were made out of the presence of Briggs, a fact which Briggs had forgotten. Ex. 12-54a This is confirmed by the deposition of Bertha Wolfe at page 27, begin line 15 and page 28, line 15. Ex. 12-55a The making of that statement was completely unsolicited and was initiated and prepared and written by Smoker herself. This is a form of self-proving of a Will thought out by Smoker long before our law in Indiana came around to this. It not only shows her basic intelligence but reveals her knowledge understanding that someone

might accuse Respondent of undue influence (which she resented as going against her wishes) and her keen awareness of the possibility that the bequests to Briggs and his family (not her kin) in her Will made them interested parties and gave them an opportunity for litigation as to her estate.

Ex. 12-56a
The absence because of the death of Ralph Hanna, (caused by the delay in bringing of these proceedings) he being her former attorney and brother of Robert Hanna who prepared her other Wills, would have been invaluable to Respondent to show setting up of the educational trusts in prior Wills, and that they were actually (her lifetime goal) and
Ex. 12-57a
the natural object of her bounty. He could have given testimony as to her motives, habits in making eccentric bequests and provisions in Wi and his long acquaintanceship with her. His absence greatly hampered the defense of this matter. He could have testified as to her thought about Victoria Cornell, an aged lady, her first cousin and only livin kin and reasons for not only the educational trust but gifts to him-
Ex. 12-58a
self, his brother, and his brother's wife. The Wills prepared by Robert Hanna are Exhibits at:

(1) Exhibit A-26; Will dated January 7, 1939. Smoker's mother and husband still living; Robert Hanna, attorney, executor.

(2) Exhibit A-27; Will dated April 18, 1942. Smoker's husband still living; Robert Hanna, first; Ralph Hanna, Attorney, second executor.

(3) Exhibit A-28; Will dated June 27, 1945. Same as A-27.

(4) Exhibit A-29; Will dated July 10, 1945. Same as A-27.

contained
Her prior Wills/bequests to other lawyers. In the 1978 and 1980 Wills prepared by Briggs, she left bequests to Ralph Hanna and Robert Hanna's widow indicating that she thought it was completely normal and regular to make gifts to her lawyers and their families.

Citations to Footnotes

For the Petition to Review of William J. Briggs

Disciplinary Commission Exhibits are listed as #D

Florence Anne Briggs Exhibits are listed as #A

William J. Briggs Exhibits are listed as #B

Calendars for 1976 and 1977 are: Attachments X & Y

All Exhibits and Evidence were delivered to the Supreme Court by the Hearing Officer.

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Ex. 12-1a: The Wolfe deposition was delivered to the Supreme Court by the Hearing Officer.

Ex. 12-2a:

Ex. 12-3a: See Bertha Wolfe's deposition page 60, lines 18 through 28. This refers to the 1968 Will. See the same deposition page 60, lines 1 through 3. Also see page 60, lines 1 through 3. Also see page 60, lines 29 and 30. Bill and Anne Briggs went to Europe on June 1, 1968, which is the day Wolfe says that Smoker came in to sign her Will. See page 56, line 30 and also page 57. This was a fact forgotten by Bill. Also see page 28, lines 22 through 28 where Respondent suggested that Smoker go to another lawyer. Also see page 62, lines 15 through 30 where Mrs. Wolfe clears up the situation as to when Bill advised Smoker to see another lawyer. As to 1970 Will, Wolfe says that she does not know whether Briggs advised Smoker to seek another lawyer at that time. Her previous comments (that he advised her to see another lawyer) relate to the 1968 Will.

Ex. 12-4a: Smoker completely forgot the 1968 Will and details surrounding it. See her deposition pages 81 and 82 beginning at 450 and ending at 458. She only remembers that Respondent made two Wills for her. She remembers the 1967 Will which was executed by her in the St. Joseph Hospital in Kokomo, but forgot the 1968 Will and then remembered the 1970 Will. The 1968 and the 1970 Wills were dictated to her in the presence of Smoker and Briggs. She typed them and then she was a witness to their execution. See Wolfe's deposition page 18 through 23. Wolfe's deposition establishes that neither the 1968 or 1970 Will was executed at the hospital. See page 56 at 30 and continuing on page 57. Also see page 24 beginning at line 2 and continuing on page 25. Before Smoker's deposition was taken on 11-22-77 by the Disciplinary Commission, Respondent had furnished information to the Commission that there was a 1968 and 1970 Will, yet the Commission at no time solicited any information from Smoker about her 1968 Will.

Ex. 12-5a: The 1968 Will was rewritten in 1970 at Smoker's request. Both the 1968 and 1970 Wills contained the $1,000.00 bequest to Respondent, the perpetual trust for educational scholarships, and provided a scholarship for Respondent's son. The 1968 Will is in evidence at Exhibit B-13 and the 1970 Will is at Exhibit P-8.

Ex. 12-6a: The Hearing Officer's statement at pages 5 and 6 under paragraph 9 is incomplete and is therefore inaccurate. It omits to state that Respondent did advise her before she signed the 1968 Will that she should see another lawyer. This is verified by Bertha Wolfe. See footnote 3a. Smoker admits in her deposition at page 21, line 90, that Respondent told her to see another lawyer. She says later after the Will was written. Since she completely forgot even making the 1968 Will, it is far-fetched and would be unreasonable to expect her to remember that Respondent had advised her at the time (she made the 1968 Will) to see another lawyer. This would be a detail surrounding execution of the 1968 Will which she forgot she made.

Ex. 12-7a: This is a typographical error. It should read deposition of Smoker.

Ex. 12-8a: At page 10, line 29, she could not remember that Respondent dictated the Wills to Mrs. Wolfe in the presence of Mrs. Smoker. Also see page 12-13, line 41.

Ex. 12-9a: See page 69, line 372 of Smoker's deposition. She could not remember when she was married--even the year. See page 108 at line 58. Of Smoker's deposition. She verifies that it has been so long since she made plans for her Will with Respondent, she could not remember the time sequence and all of the details surrounding making her Will.

Ex. 12-10a: See Wolfe's deposition page 54 at 12 through page 55, line 1.

Ex. 12-11a: See Wolfe's deposition page 18, line 22 through 30.

Ex. 12-12a: Wolfe's deposition page 21, lines 1 through 19.

Ex. 12-13a: The citation at page 15 is not correct. It is Wolfe's deposition page 16, line 18 and continuing on page 17, line 4.

Ex. 12-14a: See Wolfe's deposition page 18, lines 22 through 30. Also see page 109, lines 591 through 593. Also see page 108, lines 587 through 589. Also see Smoker's deposition at page 16, line 16.

Ex. 12-15a: See Wolfe's deposition.

Ex. 12-16a: See Smoker's deposition.

Ex. 12-17a: See Wolfe's deposition page 20, line 23 through 30 and page 31 at line 31.

Ex. 12-18a: See Wolfe's deposition page 20, line 28 and page 21, line 5.

Ex. 12-19a: See Smoker's deposition pages 107 and 108. See Wolfe's deposition page 20, lines 14 through 18.

Ex. 12-20a: See Wolfe's deposition.

Ex. 12-21a: See Wolfe's deposition.

Ex. 12-22a: See Wolfe's deposition.

Ex. 12-23a: See Wolfe's deposition.

Ex. 12-24a: See Wolfe's deposition.

Ex. 12-25a: See Wolfe's deposition page 61, lines 1 through 20 and 4 through 11.

Ex. 12-26a: See Hearing Officer's Report pages 4, 5 and 6 including paragraphs 5, 6, 7, 8 and 9. Paragraph 9 is particularly not accurate.

Ex. 12-27a: See footnotes 3a, 4a, 5a, 6a, 7a and 8a.

Ex. 12-28a: See Wolfe's deposition page 18, lines 25 through 30; also see page 20, lines 1 through 3; also see page 21, lines 1 through 5.

Ex. 12-29a: See Wolfe's deposition pages 21, lines 4 through 7.

Ex. 12-30a: A later reading of the Hearing Officer's Report reveals it states, "The trust provision was entirely Kate Smoker's idea and there has never been any suggestion to the contrary." Presumably this includes (1) the idea of creating a trust for all boys of Carroll County and also (2) the idea for making a provision favoring the son of the decedent. If not, the above citations all disprove anything to the contrary. Smoker's deposition at page 20, line 84 through 87 clears up that the $1,000.00 bequest to Respondent and bequest to son was of her own free will.

Ex. 12-31a: Wolfe's deposition page 18, lines 25 through 30; also see page 8, lines 15 through 18.

Ex. 12-32a: Smoker's deposition at pages 13 and 14 show that she thought it absolutely normal and regular to make bequests to prior and present lawyers and the widow of a prior lawyer.

Ex. 12-33a: Smoker's deposition.

Ex. 12-34a: Mary Bernice Smoker died on 11-21-79. Bertha Wolfe moved to Arizona in December of 1976. (Because of her husband's health which deteriorated until he died recently) Bertha Wolfe's deposition was taken on 8-18-81. She became a heart attack victim. Delay. Respondent can not be charged with delay of any significance in bringing this matter to trial. Marks and Power filed a grievance against Respondent in July of 1977. This was 7 years before this case was tried. A few days later on 8-4-77 Respondent requested an extension of time to file a response to the grievance. The executive secretary denied the request but agreed not to take any formal action (not to file a complaint) until 8-29-77. See events #42 and #43, page 74 of the memorandum in supporting affidavits filed with the Supreme Court by Respondent on or about 5-7-84. Shortly thereafter, but unknown to Respondent, his attorney, Joseph T. Ives Jr., had had an oral conversation with David Copenhaver, Attorney at the Commission, by which Ives agreed to a date for taking Smoker's deposition and Copenhaver agreed for no response to the grievance to be filed until the deposition was taken. See events #46 and #47, same memorandum. Attorney Ives had proposed filing a short concise

continuation of footnote 34a

response but Copenhaver suggested a detailed response. Thereafter Respondent complied and filed both a concise as well as a detailed response on 2-4-78. See events #49 and #50 in same memorandum. The Disciplinary Commission did not file a complaint against Respondent until 10-24-78. Respondent by counsel (see event #61 same memorandum) filed his response to the complaint on 11-24-78 which was timely. See event #64, same memorandum. From 11-78 through 5-18-81, there was no activity (known to respondent) at the Court or the Commission. This constituted a delay of 30 months which was not caused by any act of the Respondent. On 5-18-81 the Executive Secretary notified Respondent that additional grievances had been filed by the same grievant, R. Adrian Marks, the leader, and others. No other grievances have ever been filed against Respondent to the best of his knowledge. Respondent filed response to the additional grievances on 10-10-81. See event #77a, same memorandum. In 6-83, James Stewart, Attorney for Respondent since summer of 1978 died. The amended complaint for disciplinary action was filed against Respondent on 7-19-83. No amended complaint was filed between 10-10-81 through 7-19-83. This is almost 2 years. Respondent did not delay the proceedings in this period of time. At page 38, paragraph 77b, the Hearing Officer states, "that correspondence between Attorney James Stewart for Respondent and Attorney Hughes for Commission indicates that informally they had agreed to wait the results of pending litigation before proceeding to trial in this cause." This argument is not on steady ground. In the first place Marks did not file his new grievances until in 5-81. The Smoker guardianship trial (objections to final report and counterclaim of both sides) ended on 8-7-80. The Court's judgment was entered on 11-5-80. The Smoker Will Contest ended on 12-9-80. The Marks additional grievance was in 5-81 and the Briggs response was on 10-10-81 but the new amended complaints were not filed until 7-19-83 which was 30 months later after the Briggs response to the new grievance. If it is argued that the Disciplinary Commission was waiting until the appeal in the guardianship was over, this fails also because the Commission did not wait. The complaint was filed in 7-83, but the decision from the Court of Appeals was not until 8-83.

The Disciplinary Commission, by its attorney, delayed the filing of the complaint and the trial in these proceedings until after James Stewart died. Then later at the trial the Disciplinary Commission attempted to prove that Respondent's attorney, James Stewart, had an informal agreement with Mr. Hughes agreeing to a delay in the trial of this matter. However, the delay in filing the complaint until after Mr. Stewart died set up a fundamental error which could never be eliminated by a trial of this matter. Testimony of James Stewart was lost because of the delay. He could not appear at the trial and testify as to the alleged agreement to delay the trial and he could not appear and explain as to any letters which were introduced on this matter. Respondent was irreparably prejudiced because of the delay. He was denied the right to present his adequate defense through James Stewart. He was denied the right to have an adequate record of this testimony. He is denied the right of having an effective review based on such testimony and record.

Ex. 12-35a: The Disciplinary Rules were adopted on 3-8-71. See Burns Indiana Statute, Court Rules, Book 2, page 349.

Ex. 12-36a: The ex post facto exception to the Hearing Officer's Report is discussed at pages 13-14 and 15 under exceptions 7 and 8 (7 and 8 are treated together under Petition for Review).

Ex. 12-37a: This Respondent received a copy of the Motion to Amend the Complaint (with reference to admittedly ex post facto problems) on or about 6-18-84. Respondent filed a Motion Opposing the Request to Amend the Petition four days later on 6-22-84. The trial commenced on or about 7-12-84. The ex post facto constitutional problem is discussed under exceptions 7 and 8.

Ex. 12-38a: This is discussed under exception 7 and 8 under changed theory and thrust of the complaint and esculated charges.

Ex. 12-39a: Mary Bernice Smoker died on 11-21-79.

Ex. 12-40a: Bertha Wolfe moved to Arizona in 12-76, because of her husband's health which deteriorated until he died recently. Her deposition was taken on 8-18-81.

Ex. 12-41a: The first Amended Complaint against Respondent was filed on 7-19-83 and the second Amended Complaint was filed about 6-15-83.

Ex. 12-42a: Smoker's deposition was taken by the Commission on 11-22-77.

Ex. 12-43a: See footnote 6a.

Ex. 12-44a: See footnote 4a.

Ex. 12-45a: See footnote 6a.

Ex. 12-46a: The Hearing Officer's Report at page 6 under paragraph 9 indicates that there was no circumstance which would have prevented her from seeing another lawyer. She drove her own car and was not dependent upon being taken places by others. See Wolfe's deposition page 29, lines 1 and 2.

Ex. 12-47a: See testimony of William J. Briggs that he made disclosures to Smoker that Briggs and his family would have had an interest in her estate by virtue of being named as beneficiaries in her Will and that his employment was undertaken with her full consent.

Ex. 12-48a: See Smoker's deposition page 20, lines 84 through 87. Smoker says at page 15, line 58, that Bill told her the Will would not stand up, "because he was in it". In her mind this was the equivalent of telling her that the bequest to him gave him an interest in her estate.

Ex. 12-49a: The holographic statement is set out on page 5 of the Hearing Officer's Report and is Exhibit B-17.

Ex. 12-50a: See footnote 47a.

Ex. 12-51a: See footnote 47a.

Ex. 12-52a: See footnote 47a.

Ex. 12-53a: See footnote 47a.

Ex. 12-54a: See Wolfe deposition page 27 commencing at line 18. See page 28, lines 13 through 15. See page 63 commencing at line 26 and continuing through page 64 at line 13.

Ex. 12-55a: The holographic statement was discussed more than once in the deposition of Mrs. Wolfe.

Ex. 12-56a: Ralph Hanna died in 3-81.

Ex. 12-57a: It is not accurate to say, as the Hearing Officer did at page 5, paragraph 8, that Smoker had no natural object of her bounty aside from her first cousin, Victoria Cornell. If Ralph Hanna had been living at the trial, he could have testified as to the long standing historical goal of Smoker to set up and establish a perpetual source of funds for scholarshipsffor boys. She had provided for such a trust in at least four Wills prior to those which were written by Respondent.

Ex. 12-58a: Ralph Hanna and his brother's widow, Mrs. Robert (or Peg Hanna) Hanna, were named as beneficiaries in Smoker's 1968 and 70 Wills. Smoker comments on this at pages 13 and 14 in her deposition. Her past Wills show her past habit of not only making bequests to her lawyers, but also in designating them as personal representatives of her Wills. This was a habit which she continued in her 1968 and 70 Wills.

Exception 13. Particularized exceptions surrounding Smoker's Will.

Respondent excepts to the Hearing Officer's Report which proposes discipline for Respondent's actions in drafting a 1970 will and advising his client thereon when his family were substantial beneficiaries as such or under a trust created therein and findings in the Report at page 55 and 97 that Respondent violated Canon 6 of the Code of Professional Ethics of the American Bar Association -- in that his professional judgment on behalf of his client may reasonably have been affected by his own financial business, property, or personal interest and to such a degree as to impair his independent professional judgment, and at page 55 under 99 that Respondent violated Canons 6 and 37 of the same code -- with knowledge of the status of Indiana law applying thereto, Respondent invited a future will contest and thereby intentionally failed to seek the lawful and appropriate objective of his client.

The second basis is:t The test or standard for judging Respondent's acts of so many years ago in the 1960's and in 1968 and 1970(in the preparing of wills in those two years) is vague, uncertain and lacks an ascertainable standard. There was a lack of due process notice as to which standard or which test --or which law --or which code specifically permitted Respondent to act/or commanded him not to act or be in violation thereof. Ex. 13-59a See footnotes Ex. 7 & 8-1 through Ex. 7 & 8-9.

The confusion in this matter was caused by the alleging of inappropriate and unenforceable violations of the Disciplinary Rules in both the original 1978 and the first amended Complaints which were not changed until in July 1984, shortly before the trial. This expost facto situation has been discussed elsewhere, and shows Respondent did not create the problem. Ex. 13-60a See footnotes Ex. 7 & 8-1 through Ex. 7 & 8-9.

In 1968 and 1970 in preparation of Wills and in 1984 in Trial on merits it is appropriate to ask: Was Respondent directed to D. R. 5-101 and the language, "except with the consent of his client after full disclosures,..." or was be directed to Ethical Consideration 5-5 and the language, "other than in exceptional circumstances,..." or was he directed to Canons 6 and 37, which the Report sets out and contains the language, "except by express consent of all concerned given after a full disclosure of the facts. The Report by its supplement filed later would rule out D. R. 5-101 and the Ethical Considerations since neither had any force or effect in Indiana until after 1968 and 1970.

On the other hand, the language of the Report at page 55, paragraph 97 appears to be adopted from D. R. 5-101, "may reasonably have been effected by his own financial business, property or personal interests and the heading of D. R. 5-101 which refers to "impair his independent professional judgment." D. R. 5-101 also refers to "except with the consent of his client after full disclosure,..." likewise does Canon 6. Ethical Consideration 5-5 brings in the new notion of "exceptional circumstances."

There was a lack of due process timely notice before trial to Respondent as to the Code and standard violated which prevented Respondent from presenting an adequate defense. Ex. 13-61a See footnotes Ex. 7 & 8-1 through Ex. 7 & 8-9

Exception 14. Particularized exceptions surrounding Smoker's Will.

Respondent excepts to the Hearing Officer's Report which proposes discipline for Respondent's actions in drafting a 1970 will and advising his client thereon when his family were substantial beneficiaries as such or under a trust created therein and findings in the Report at page 55 and 97 that Respondent violated Canon 6 of the Code of Professional Ethics of the American Bar Association -- in that his professional judgment on behalf of his client may reasonably have been affected by his own financial business, property, or personal interest and to such a degree as to impair his independent professional judgment, and at page 55 under 99 that Respondent violated Canons 6 and 37 of the same code -- with knowledge of the status of Indiana law applying thereto, Respondent invited a future will contest and thereby intentionally failed to seek the lawful and appropriate objective of his client.

The third basis: The test or standard for judging Respondent's acts of so many years ago in the 1960's and in 1968 and 1970 ( in the preparing of Wills in those two years) is vague, uncertain and lacks an acertainable standard. Ex. 14-62a* The language or words in the standards finally chosen by the Disciplinary Commission in the Third Amended Complaint (Canons 6 and 37) and findings by the Hearing Officer (Page 55 of the Report) are subject to differing interpretations and definitions by reasonably prudent lawyers and leave them lacking as to an ascertainable standard, as follows:

(1) "...to disclose to the client all the circumstances..." (from Canon 6).

(2) "...to give full disclosure of the facts..." (from Canon 6).

(3) "...other than in exceptional circumstances..." (from EC-5).

(4) "...may impair his independent professional judgment..." (from D.R. 5-101).

(5) "...except with consent of his client after full disclosure..." (from D.R. 5-101).

*See footnotes Ex. 7 & 8-1 through Ex. 7 & 8-8

Joseph T. Ives Jr., an Attorney who at one time represented Respondent testified at the hearing that Mr. Copenhaver, and attorney for the Disciplinary Commission, had said that they wanted to make the Briggs case a test case. Aside from not wanting to be a guinea pig, the legal objection is that prosecution for a test case would amount to selection for arbitrary enforcement--an unconstitutional motive. It has been said that the Disciplinary Commission, in wanting to make this a test case, wanted to obtain a ruling (a standard) on just how far an attorney could go before he had to throw his client (who wanted to make a gift to him) out of his office. Nothing could more clearly indicate that the Disciplinary Commission felt that there was indeed a lack of an ascertainable standard leaving this and other Respondents with no certain but only vague guidance. Even if it can be said that finally there was a written standard designated for judging the alleged conduct, then it must also be said that the standard is so vague so to be lacking an ascertainable standard sufficient to give due process notice. Such an uncertain standard failed to give the required due process notice; and certainly failed to provide Respondent with knowledge of Indiana law applying to the situation at the time he acted in the early 1960s and in 1968 and 70, and failed to provide due process notice so that in 1984 it would be possible for him to present an adequate defense at the trial.

Ex. 14-63a*

*See testimony of Joseph T. Ives at the trial in Rochester.

# 1976

### JANUARY

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# 1977

**JANUARY**

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CERFICIATE OF SERVICE

I hereby certify that I filed the original of this Petition to Review As Annotated by footnotes with the Clerk of the Supreme Court on this the 20th day of May, 1985 and I caused one true and exact copy of the same on this the 20th day of May, 1985 to be deposited in the U. S. Mail postage prepaid addressed to Mr. David Hughes, Attorney for the Disciplinary Commission, 8777 Purdue Road, Suite 235, Indianapolis, IN 46268.

William J. Briggs

William J. Briggs
Box 2, Flora, IN 46929
219 967-3631

Dated and Mailed

MAY 20 1985

Briggs & Briggs-304-22-1525
28 S. Center Street
P.O. Box 2, Flora, Ind. 46929

Filed 1/28/87

IN THE SUPREME COURT

OF THE

STATE OF INDIANA

| | | |
|---|---|---|
| IN THE MATTER OF | ) | |
| | ) | |
| WILLIAM J. BRIGGS | ) | Cause No. 1078 S 235 |
| | ) | |
| FLORENCE ANNE BRIGGS | ) | Cause No. 783 S 262 |

PETITION BY NEW COUNSEL
FOR A TEMPORARY STAY OF THE COURT'S
DECISION ENTERED JANUARY 13, 1987,
SUSPENDING RESPONDENTS FROM PRACTICE

This petition for a temporary stay is filed by Abady & Jaffe, new counsel for Respondents William J. Briggs and Florence Anne Briggs.

1. Counsel was retained several days ago for the purpose of representing Respondents before the United States Supreme Court in a review of this Court's decision and disciplinary action suspending Respondents from the practice of law effective February 16, 1987. In the decision herein, this Court addressed a number of the federal constitutional issues raised by Respondents.

2. Because we believe this Court's ruling conflicts with (i) precedent in the highest courts of other states, and (ii) precedent established by the United States Supreme Court, review is sought before that Court.[1]

3. The pleadings, exhibits and record in this judicial action, as the Court well knows, are exceedingly voluminous. We simply ask that the suspension order, scheduled to take effect on February 16, 1987, and the filing requirement of Rule 23 Section 26 (b) of the Admission and Discipline Rules be stayed temporarily while review is sought in the United States Supreme Court.

4. A temporary stay of this Court's suspension order would cause no prejudice to the people of Indiana, the Bar of Indiana nor to the Disciplinary Commission which prosecuted this matter. Although the Court found Respondents to have engaged in

misconduct arising from Respondent William J. Briggs's professional relationship with one Kate Smoker, the Disciplinary Commission did not allege, and this Court certainly did not consider Respondents to be, in any sense, a danger to the community. Indeed, these proceedings arise out of the only claim of misconduct alleged against Respondents during their twenty-eight years of practice. Allowing them to practice a few more months while a writ of certiori is sought will cause no harm to anyone.

5. Moreover, charges against Respondent William J. Briggs were first filed by the Disciplinary Commission in 1978, and other charges against him and Respondent Florence Anne Briggs were filed in 1983. The matter has proceeded at a slow pace, and was not aggressively prosecuted. Hence, we respectfully submit it should be stayed but a little longer while review is sought

before the United States Supreme Court.

6. No undue delay will be occasioned by seeking such review. Time limits for seeking a writ of certiori are strictly provided, 28 U.S.C. 2101, and the United States Supreme Court will not accept a matter untimely filed.[2] Hence, should a petition for writ of certiori be unsuccessful, the stay would last but a few months, and no excessive delay will result, as is sometimes the case before busy trial courts where matters are routinely adjourned or continued.

7. Moreover, should Respondents succeed in obtaining review by the Supreme Court, the time between briefing, argument and decision is approximately one year. A stay is necessary to insure that, if the United States Supreme Court were to overturn this Court's decision, such would not be a pyrrhic victory. Mrs. Briggs was

suspended for one year, and Mr. Briggs for two. Without the temporary stay requested herein, Respondents will be needlessly punished during the year the matter is pending before the United States Supreme Court should the High Court overturn this Court's decision.

8. Respondents have been suspended from practice the same day. Hence, the family will lose its income earning ability simultaneously. Although the Court may not have considered the hardship that would result, we ask the Court to consider this as an additional reason warranting a temporary stay. While the stay is in place, and the matter submitted to the United States Supreme Court, Respondents can organize their affairs and have sufficient time to establish new means of income or employment. It is difficult for any family to lose one breadwinner. It is especially hard to lose two at the same

time.

9. Further, Rule 23, Section 26(b) of the Rules of this Court require that Respondents file affidavits within twenty days of notice of the suspension that they have placed their cases in the hands of new counsel, or advised their clients to obtain new counsel.

10. As set forth in the accompanying affidavits, Respondents have 138 active cases. It is humanly impossible to properly review these files, evaluate the steps to be taken for each one, find the appropriate counsel to refer them to, and draw memoranda or transmittal letters to new counsel within the time limits of Rule 23, Section 26(b). In fairness to Respondents' clients, we respectfully ask this Court to afford Respondents more time to wind up their affairs.[3]

11. In addition, Respondent William J.

Briggs is in the unique position of having been sole counsel to one significant client, the Bachelor Run Conservancy District, a flood control agency, for the past 26 years. Mr. Briggs advises that it would take days and perhaps weeks for him to familiarize new counsel with all the background information, legal and non-legal, to assume the task of representing this municipal organization. Hence, in fairness to this client, a public entity which affects the public interest, the Court should allow Respondents sufficient time to turn over representation to new counsel.

12. Therefore, even if the Court declines to stay the suspension during the pendency of proceedings before the United States Supreme Court, we respectfully request that the suspension be stayed for a period of no less than ninety (90) days so that Respondents may properly meet their

duty to their clients, the Bar and this Court under Rule 23, Section 26(b), and be given the time necessary to wind up a substantial practice.

Respectfully submitted,

ABADY & JAFFE
Counsel for Respondents
Pro Hoc

By (ss)Richard Jaffe
A Member of the Firm
342 Madison Avenue
21st Floor
New York, New York10173

BRIGGS & BRIGGS
Respondents

(ss)Florence Anne Briggs
By:(ss)William J. Briggs
A Member of the Firm
Box #2
Flora, Indiana 46929

ENDNOTES

1 See, Rule 17(1)(b) and (c), Rules of the United States Supreme Court.

2 See, Rule 20(3), Rules of the United States Supreme Court, which provides: "The Clerk will refuse to receive any petition for writ of certiori which is jurisdictionally out of time."

3 At the very least, we request the Court enlarge the time requirements of Rule 23, Section 26(b) in this instance.

Filed 2/12/87

IN THE

SUPREME COURT OF INDIANA

IN THE MATTER OF )
)
WILLIAM J. BRIGGS ) Cause No. 1078 S 235
)
FLORENCE ANNE BRIGGS) Cause No. 783 S 262

ORDER DENYING PETITION FOR TEMPORARY STAY

Come now the Respondents in these causes, William J. Briggs and Florence Anne Briggs, and file a joint "Petition by New Counsel for a Temporary Stay of the Court's Decision Entered January 13, 1987, Suspending Respondents from Practice", wherein they seek a stay of this Court's order of suspension pending review by the United States Supreme Court or alternatively, a stay of such suspension for a period of not less than ninety days to afford an opportunity to wind up practice and meet their duties under Admission and Discipline Rule 23, Section 26(b). Additionally, Respondents have filed a supplementary submission in support

of this petition for a temporary stay.

This Court, being duly advised, now finds that Respondents should not be granted the relief they seek.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that Respondents' joint "Petition by New Counsel for a Temporary Stay of the Court's Decision Entered January 13, 1987, Suspending Respondents from Practice" be denied in all particulars.

DONE at Indianapolis, Indiana this 12 day of February, 1987.

(ss)Richard M. Givan

RICHARD M. GIVAN
Chief Justice of
Indiana

DeBruler, Pivarnik, Shepard, J.J., Concur.
Dickson, J., Not Participating.

(FILED 2/2/87)

IN THE SUPREME COURT

OF THE

STATE OF INDIANA

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| IN THE MATTER OF | ) | |
| | ) | |
| WILLIAM J. BRIGGS | ) | Cause No. 1078 S 235 |
| | ) | |
| FLORENCE ANNE BRIGGS | ) | Cause No. 783 S 262 |

PETITION BY NEW COUNSEL
FOR A MODIFICATION OF THE COURT'S
DECISION ENTERED JANUARY 13, 1987,
SUSPENDING RESPONDENTS FROM PRACTICE

This petition for modification is filed by Abady & Jaffe, new counsel for Respondents William J. Briggs and Florence Anne Briggs.

1. We submit this petition seeking modification of this Court's decision, dated January 13, 1987, suspending William J. Briggs and Florence Anne Briggs from practice, effective February 16, 1987, for a period of two years, and one year, respectively.

2. We respectfully request that this

modify its decision to allow Respondents to serve their suspensions sequentially rather than concurrently, based on the following considerations.

3. The Respondents in these causes are in a unique position which renders this Court's punishment unusually harsh in its effect, and greatly disproportionate to Respondents' alleged misconduct.

4. It is not a common occurrence that both husband and wife are attorneys at law. It is even more unusual for the husband and wife to be the sole partners of their own firm.

5. When all the members of a firm are disciplined by suspension simultaneously the effect on the firm is devastating, as it is forced to close, perhaps permanently. The members are precluded from using those professional skills that have been the sole source of their income, and then try to support themselves by other means.

Primarily, they rely on the financial support of other family members while seeking a new way to make a livelihood.

6. In this instance, Respondents' simultaneous suspensions result in a disqualification of both wage earners in their family. This will result in a total loss of the family's earning ability.

7. Respondents' concurrent suspensions, therefore, greatly increases the effect of the penalty on each of them.

8. We submit that this very substantial hardship is unnecessary and avoidable.

9. Respondents respectfully request that the Court modify the suspension orders to provide that their suspension periods not overlap so that the penalty imposed on each Respondent will be commensurate with his or her misconduct, and not compounded by the others concurrent suspension.

10. Accordingly, we request that one Respondent be allowed to serve his or her

suspension period, before the other suspension takes effect.

11. There will be no prejudice to the people of Indiana, the Bar of Indiana nor to the Disciplinary Commission which prosecuted this matter, by granting this request. The Disciplinary Commission did not allege, and this Court certainly did not consider Respondents to be, in any sense, a danger to the community in these proceedings. Indeed, Respondent's community had indicated its support for the Respondents in several petitions filed with this Court seeking leave to have Respondents' continue to represent them during the suspension period.

12. In the alternative, we respectfully request that this Court reduce the length of Respondents' suspensions to the terms recommended by the Hearing Officer in his report; specifically a suspension of six (6) months for William J. Briggs and a

public reprimand for Florence Anne Briggs.

WHEREFORE, Respondents pray that this Court modify its decision to allow Respondents to serve their sanctions sequentially, and to reduce the sanctions to those recommended by the Hearing Officer.

Respectfully submitted,

ABADY & JAFFE
Counsel for Respondents
Pro Hoc

By:(ss)Richard Jaffe
A Member of the Firm
342 Madison Avenue
21st Floor
New York, New York10173
(212) 986-0600

BRIGGS & BRIGGS
Local Counsel

(ss)Florence Anne Briggs
By:ss/William J. Briggs
A Member of the Firm
Box # 2
Flora, Indiana 46929

Filed 2/25/87

IN THE SUPREME COURT

OF INDIANA

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| IN THE MATTER OF | ) | |
| | ) | Cause No. 1078 S 235 |
| WILLIAM J. BRIGGS | ) | |
| | ) | |
| FLORENCE ANNE BRIGGS | ) | Cause No. 783 S 262 |

ORDER DENYING RESPONDENTS' PETITION FOR MODIFICATION

Come now petitioners, William J. Briggs and Florence Anne Briggs, and petition this Court for reduction of the imposed suspensions and/or that such suspensions be served sequentially. And this Court, being duly advised, now finds that such petition should be denied.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Respondents' Petition for a Modification is hereby denied.

Done at Indianapolis, Indiana, this 25 day of February, 1987.

SS:Richard M. Givan

Richard M. Givan
Chief Justice of
Indiana

Dickson, J., not participating.

Filed 5/7/84

IN THE SUPREME COURT

OF THE

STATE OF INDIANA

| | |
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| IN THE MATTER OF | |
| WILLIAM J. BRIGGS | CAUSE NO. 1078 S 235 |
| FLORENCE ANNE BRIGGS | CAUSE NO. 783 S 262 |

PRESENTATION OF CONSTITUTIONAL ISSUES AND ERRORS - PETITION FOR HEARING, ORAL ARGUMENT, AND ORDER OF DETERMINATION

Respondents for their Petition on Constitutional Issues and Errors allege and say:

1. These two causes of action are at present active matters pending on two separate disciplinary complaints filed against William J. Briggs and Florence Anne Briggs, hereinafter called Bill and Anne, who are husband and wife. They are residents of and are licensed to practice law in Indiana.

2. By this pleading Respondents are again calling to the attention of the

hearing officer and the Supreme Court of Indiana certain constitutional issues and fundamental errors. These issues and errors were set out in the Responses (to the Complaints) which have been on file since August 19, 1983, with the hearing officer, attorneys for the Disciplinary Commission, and the Supreme Court of Indiana.

3. Respondents request that the Supreme Court of Indiana conduct a hearing on said constitutional issues and fundamental errors. Respondents request permission to present evidence and oral argument at said hearing. Respondents further request the Supreme Court of Indiana to enter an order containing final determinations as to said constitutional issues and fundamental errors which are raised herein.

4. The Issues raised on this pleading are attached hereto and are incorporated herein as if copied in full.

They are listed on a Summary of Issues which can be used as an Index.

5. Respondents specifically petition the Supreme Court of Indiana to conduct the requested evdidentiary hearing, hold oral argument and enter the requested court order containing final determinations on said issues and errors prior to and before the trial or hearing on the merits on the disciplinary complaints by no later than thirty days after the date of the filing of this pleading. This time span is requested so as to not frustrate the right to utilize constitutional right and remedies. Pursuant to R.A.D 23, Sec. 14(a), Book 2, page 268. Burns Indiana Statutes Annotated provides that if a respondent does not answer the complaint, it shall be taken as denied. In all fairness to Respondents, they should be entitled to a reciprocal rule. Accordingly if this petition is not acted upon as requested

herein by the Supreme Court of Indiana within thirty days after it is filed, the Respondents will treat this matter as if there had been a hearing and the Petition has been denied.

6. Each Respondent, Bill and Anne, had filed a written motion for separation of trial on his or her respective complaint. The hearing officer has denied each of their motions. The Respondents now renew their motions and request the Supreme Court of Indiana to grant these motions. The court is requested to hold a hearing and permit presentation of evidence and oral argument on these motions.

7. Florence Anne Briggs filed on April 4, 1984 her Motion to Dismiss which supplemented her original Response to the Complaint filed against her. This has not been ruled upon by either the hearing officer or the Indiana Supreme Court. The court is requested to hold a hearing and

permit presentation of evidence and oral argument on this Motion.

8. Respondents say that there is an urgent necessity for granting relief, and that immediate and irreparable injury, harm, prejudice, loss, and damage will result to them if relief is not granted to them immediately. In support of this they have attached hereto their supporting Affidavit setting out facts and extraordinary circumstances which affidavit is designated as SUPPORTING AFFIDAVIT SHOWING URGENT NECESSITY FOR GRANTING RELIEF, which is incorporated herein as fully as if copied in full.

9. In order to demonstrate the harm to the Respondents which has been and will be done to them due to loss of witnesses because of the prolongation of these proceedings, Respondents have attached hereto their Supporting Affidavit setting out such facts and loss which is incorporated herein as fully as if copied

in full, which is designated as AFFIDAVIT RELATIVE TO TESTIMONY OF DECEASED OR UNAVAILABLE WITNESSES.

10. In order to substantiate certain facts for the purpose of seeking relief requested in this petition including the prayer for summary judgment, Respondents have attached hereto their Supporting Affidavit which affidavit is designated as STATEMENT OF CASE AND CHRONOLOGY OF EVENTS which is incorporated herein as fully if copied in full.

PRAYER FOR RELIEF: WHEREFORE, THE Respondents request the following items of relief from the Supreme Court of Indiana, to-wit:

(A) Respondents specifically petition the Supreme court of Indiana to conduct the requested evidentiary hearing, hold oral argument and enter the requested court order containing final determinations on said issues and errors prior to and before the trial or hearing on the merits on the

disciplinary complaints by no later than thirty (30) days after the date of the filing of this pleading, and

(B) Respondents request that all allegations of misconduct premised upon facts, circumstances and events which occurred before adoption in 1971 of the Indiana Code of Professional Responsibility be dismissed and expunged from the Complaints filed on July 19, 1983, against both Respondents because they violate ex post facto rules against retroactive operation of the Disciplinary Rules and due process law provisions.

(C) Respondents request that all of the facts, circumstances and all allegations of any misconduct which were contained in the Complaint filed on October 24, 1978, against William J. Briggs which have been incorporated into the Amended Complaint against William J. Briggs and the only Complaint filed against Florence Anne Briggs filed July 19, 1983, be dismissed

and expunged from the complaints filed on July 19, 1983 on the ground that they are stale; that the Court order declare that the materials expunged and allegations dismissed be with prejudice to the right to refile same, and the order be a bar to further prosecution of same.

(D) That the Court determine and enter an order that the Disciplinary Commission shall not be permitted to prove any allegation of misconduct by using the decision of Judge Robert Munro which was handed down in November of 1980 in the Smoker Guardianship case # G-76-14 in the Carroll Circuit Court, and that the Disciplinary Commission shall not be permitted to prove any allegation of misconduct by using the decision of the Court of Appeals of Indiana handed down on August 9, 1983, in cause #2-581A150 on the grounds that Disciplinary Commission prolonged these proceedings until they filed an Amended Complaint on July 19,

1983 against William J. Briggs and the only Complaint against Florence Anne Briggs which was only 21 days before the Court of Appeals handed down the above mentioned decision, and that such prolongation was to gain an unfair tactical advantage which is a wrongful motive--unconstitutional in violation of fundamental fairness of the Indiana and U.S. Constitutions and in violation of DR 1-102(5) engaging in conduct that is prejudicial to administration of justice.

(E) That the Court find and enter an ORDER determining that the Disciplinary Complaints be dismissed as against each of the Respondents, William J. Briggs and Florence Anne Briggs, and that the Order be a bar to any further proceedings herein, or if this relief be not granted, then

(F) That the Court treat this pleading as Complaint for Declaratory Judgment and enter judgment in favor of William J.

Briggs and Florence Anne Briggs determining their rights so that the judgment may be used as a bar to any further proceedings herein, or if this relief be not granted, then

(G) That the Court treat this pleading as a Motion for Summary Judgment and that the Court make determinations and findings and enter a judgment in favor of William J. Briggs and Florence Anne Briggs, or if this relief be not granted, then

(H) That the Hearing Officer and the Court find that the Respondents have already been required to suffer more punishment than is required and that no discipline is warranted and that no costs or expenses of any nature be assessed against Respondents.

William J. Briggs, Respondent, and Florence Anne Briggs, Respondent, each now say under the penalties for perjury that the matters and facts contained in this

Response are true to the best of his or her knowledge and belief.

ss/ Florence Anne Briggs ss/ William J. Briggs
Florence Anne Briggs William J. Briggs

(address and telephone number omitted)

ISSUES PRESENTED

ISSUE 1a: Denial of Fundamental Fairness to these Disciplinary Proceedings. The fundamental fairness of these proceedings against Bill and Anne had been destroyed by the Disciplinary Commission which has by its deliberate indifference, neglect, or by unreasonable or deliberate delay prolonged these proceedings for seven years from grievance in July of 1977 and complaint filed in October of 1978. This has caused loss of witnesses, loss of memory and ability to recall, and other harmful circumstances related to passage of time which has caused irreparable harm to Respondents in violation of due process rights of

Respondents as guaranteed by Amendments 5, and 14 of U.S. Constitution and by Indiana Constitution in Article 1, Section 12.

ISSUE 1b: Denial of Speedy Investigation and Speedy Trial. Respondents have been deprived of their right to a speedy investigation and a speedy trial by the Disciplinary Commission which has by its deliberate indifference, neglect, or by unreasonable or deliberate delay prolonged these proceedings for seven years from the grievance in July 1977 and complaint filed in October of 1978. This has caused loss of witnesses, loss of memory and ability to recall, and other harmful circumstances related to passage of time which has caused irreparable harm to Respondents in violation of Aritcle 1, Section 12 of the Indiana Constitution and Amendment 6 of the U.S. Constitution. By the case of Klophfer v. North Carolina, 386 U.S. 213, 19 L.Ed.2d 1, 87 S.Ct. 988 (1967) the U.S.

Supreme Court held that the 6th Amendment to the U.S. Constitution standards governing speedy trial are made obligations on the States by Amendment 14, the federal due process clause. The most recent case on speedy trial rights appears to be the decision of the Court of Appeals of Indiana handed down on March 28, 1984, Scott v. State, 461 N.E.2d 141. The much discussed federal case of Dickey v. State of Florida, 398 US 30, 26 L.Ed.2d 26, 90 S.Ct. 1564 (1970) set out the federal standard for review of state procedures for speedy trial and investigation. The Barker Case sets out the test. Barker v. Wingo, (1972) 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182.

ISSUE 2: Violation of Rule against Retroactive Operation of the Disciplinary Rules--Lack of Due Process Notice. The Respondents are being denied protection from the attempt to cause the Disciplinary Rules to operate retroactively. This is

so because the complaints filed against Bill and Anne contain many allegations premised upon the conduct committed many years before 1971. The Disciplinary Rules were adopted in 1971. The complaints also charge misconduct committed in 1968 and 1970 because of writing of wills in those years. The exact rhetorical paragraphs of both complaints containing these allegations are set out in the memorandum for this Issue 2. The complaints do not designate the violation of any code or any section thereof which was in effect before 1971. The Respondents are being denied due process of law because they are entitled to know in advance of the trial which code and which section thereof is being violated. The complaints are fatally defective by reason of being vague and uncertain because they do not give this due process notice. Since the Respondents are deprived of notice in advance of the trial, there is fundamental

unfairness and fundamental error. Respondents are being denied a fair opportunity to meet the accusations; they can not prepare an adequate defense and can not have a fair trial.

The Constitutional and other provisions guaranteeing these rights are: Article 1, Section 24 of the Indiana Constitution; and Article 1, Section 10, Clause 1 of the U.S. Constitution. Amendments 5 and 14 of the U.S. Constitution protect against lack of notice and in addition prohibit using or applying any law retroactively which would deny notice of the very existence of that same law. A decision of the Indiana Supreme Court is a ruling precedent; i.e. State ex rel, Benjamin v. Criminal Court of Marion County (1976) 264 Ind 191, 341 NE2d 494 which provides that "A rule changed by the Supreme Court must operate prospectively and not retroactively." The Indiana Code of Professional Responsiblity

is a code adopted by the Supreme Court of Indiana in the year of 1971 and is found in Court Rules, Book 2, page 289 et. seq., Burns Indiana Statutes Annotated.

ISSUE 3: Denial of Right of Redress to Private Citizen. Bill and Anne as citizens have the same rights as other citizens. Even though they are lawyers, they have a right not to be set apart into a separate class of second class citizens with watered down rights. Aritlce 1, Sec. 23, Constitution of Indiana; Sec. 1, Amendment 14, United States Constitution. Bill and Anne as private citizens have the same rights as other private citizens for redress of grievances under Article 1, Sec. 12, Indiana Constitution and Amendment 1, United States Constitution. Bill and Anne are being denied their right of redress of grievance possessed by others because the disciplinary complaint filed against Bill seeks in paragraph number 39 and other paragraphs to prevent

him from excercising his right of redress by charging him with misconduct for contesting the Will of Smoker. Although Anne was not a party to that lawsuit, the disciplinary complaint filed against her mistakenly charges her in paragraph 26 with like conduct and seeks to prevent her from using her right of redress. The disciplinary complaint is seeking to deny her like priviledges and immunities and, she is being subjected to the same harm as Bill. They will be harmed because the commission is seeking to deprive them of their license to practice law because they sought to utilize the same rights to redress possessed by other citizens.

ISSUE 4: Denial of Right of Redress for Grievnace -- Denial of Right to Hearing and Determination of Constitutional Issues Which are Fundamental Errors. Under Amendment 1 to the United States Constitution and Article 1, Section 12 of the Indiana Constitution,

citizens have the right to seek redress of grievances including timely redress for fundamental constitutional errors. Amendments 5 and 14 to the United States Constitution guarantee due process of law to all citizens and due process includes the right to seek redress of grievances. Bill and Anne have the right of redress for grievances for Constitutional errors and/or violations, including timely redress when it is meaningful and not a redress delayed until it is meaningless. Because Bill and Anne have raised the Constitutional issues and errors in their Responses filed heretofore on or about August 19, 1983, almost nine months ago, and because the Supreme Court of Indiana has not acted upon them, Bill and Anne have been denied their right of redress and they have probable cause for believing that they will be so denied in the future at a meaningful time, before the hearing presently set for July 12, 1984. Many of

the Constitutional errors raised in the pleading to which this is attached and raised in the Reponse filed on or about August 19, 1983, are fundamental errors which cannot be eliminated by being presented as a defense at the trial on the merits. Since the hearing officer in a Disciplinary Proceeding in Indiana has the duty of making written findings of facts as to whether there has been misconduct and of making recommendations as to punishment, the word "trial" in the sense it is used in the Constitutional law for due process purposes is the hearing before the hearing officer. If the Supreme Court of Indiana does not grant Bill and Anne their request for an evidentiary hearing, oral arguments and if the Supreme Court of Indiana fails to enter an order making a final determination on said issues and errors prior to and before requiring the hearing before the hearing officer on the merits, then the Respondents will be

denied the Right of Redress of Grievance for all of the violations of all Constitutionally protected rights which are set out in this entire pleading to which this is attached and they will be denied the right of redress of grievances at a time when it is meaningful. Respondents will be harmed if the Supreme Court does not hear evidence and oral argument and make a decision prior to the trial of this cause because requiring the Respondents to enter into a trial which would be Constitutionally void would be meaningless and because they should have time to pursue other legal remedies before trial which will be denied to them if the Supreme Court of Indiana refuses to make a timely decision on Constitutional questions raised herein prior to trial.

ISSUE 5: Arbitrary and Capricious Application of the Disciplinary Rules--Lacking Fairness and Unifority of Application--Discrimination--Denial of

Equal Protection--Vindictive Prosecution and Selective Prosecution--Bad Faith--Harassment. Bill and Anne are entitled to the same privileges and immunities under the Disciplinary Rules and to the advantages of uniformity of application of the rules and equal protection for denials of such rights--as other citizens who are similarly situated, i.e., all other persons licensed to practice law in Indiana. The Indiana Code of Professional Reponsibility, in its preliminary statement provides that "...the Disciplinary Rules should be uniformly applied to all lawyers..." see Book 2, page 291, Court Rules, Burns Indiana Statutes Annotated. Equal protection of the law is guaranteed by Article 1, Sec. 23 of the Indiana Constitution; and by Sec. 1, Amendment 14 of the United States Constitution. Bill and Anne are being denied equal protection because they are being denied privileges and immunities

under the Disciplinary Rules which are being given to prosecuting-grievants (Marks and Power) who are lawyers and to attorneys for the Disciplinary Commission. Supporting facts are set out in the memorandum for Issue 5. Although the Disciplinary Commission disciplines lawyers in Indiana for less harmful neglect under DR 6-101(a)(3), that same commission and its attorneys, neglected, unreasonably delayed, or deliberately delayed the course of these proceedings for (7) seven years by way of a complaint which has been filed since October 1978 based on a grievance filed in July 1977. Because the Disciplinary Commission has knowledge of such flagrant disparity in applications of Disciplinary Rules and of its own neglect or delay causing these long extended proceedings, the actions of the commission in violating Respondents' constitutional rights can not be excused on the grounds of oversight or honest

mistakes, but must be classified as arbitrary and capricious and made in bad faith. Their coercive actions in filing a series of charges show harassment and vindictive prosecution. Their wrongful motives demonstrate selective prosecution. Their lack of fairness and objectivity indicate failure to seek a fair and just result which violates DR 1-102 (A)(5) which is engaging in conduct which is prejudicial to the administration of justice. The actions and conduct described herein have produced unconstitutional advantages for the prosecution and have hampered and imparied the defense to the extent that they will be denied a fair trial as guaranteed by due process law under Amendment 5 and 14 of the U.S. Constitution; and Article 1, Sec. 12, Indiana Constitution. The long course of these proceedings have subjected Bill and Anne to cruel and unusual

punishment which is repugnant to Amendment 8, U.S. Constitution.

FLAGRANT EXAMPLES OF SELECTIVE PROSECUTION COMPARISON -- AVOIDANCE OF PROSECUTION -- SELECTIVE PROSECUTION

Respondent, Anne, is charged under DR 5-102(A) with serving as a trial lawyer in the Smoker will contest in which she was not a witness although her husband, Bill, was a party and a witness. She is charged with the same Disciplinary Rule with misconduct in the Smoker guardianship case. She did testify in that case but for very limited purposes. By comparision, Marks and Power, prosecuting-grievants, served as lawyers in the very same Smoker Will contest and Marks testified extensively as a major witness. He has admitted this under oath. Power was privy to most of the facts to which Marks testified and ought to have anticipated that he would be called as a witness in the will contest although he wasn't. Both served as lawyers for the

will contest and each received $60.00 per hour for acting as trial counsel in the will contest totalling approximately $31,000. In addition, Marks employed a trial secretary from his personal abstract office who received over $4000 for her services. In the Smoker guardianship case, both Marks and Powers testified as wtinesses and both served as trial counsel. They were paid $4000 by Smoker before she died and after she died they received another approximately $48,000.00 as trial lawyers in that case. The most outrageous disparity in prosecution is that the Disciplinary Commission scrupulously avoided charging either Marks or Powers with a violation under 5-102(A) but on the other hand selectively prosecuted Anne for a violation of the very same disciplinary rule 5-102(A).

Another example of serious lack of uniformity in prosecution is as follows: Bill and Anne are charged under DR 7

-104(A)(1) with communicating on a subject of representation with the Burlington Methodist Church. It is alleged that they knew the Church was represented by a lawyer. By comparison, Marks and Powers communicated directly with Smoker and began representing her, doing work for her and drafting documents for her when she was represented by another lawyer and they knew she was represented by William Briggs. At the same time, they began making decisions for her even though they knew that she was a ward and that her legal guardian was Bill. They completely disregarded the directions of EC 7-12 and immediately the began making decisions for Smoker for which they should have looked to Bill, her guardian, or for which they should have sought court approval. Their actions show defiance and disrespect for the Rules. By comparison Bill and Anne have been charged with violating DR 7-104(A)(1) and the Disciplinary Commission

has scrupulously avoided charging Marks and Powers with the same violation under the same Disciplinary Rule.

As Murray Schwartz states at page 76 of Lawyers and the Legal Profession, Cases and Materials, Bobbs-Merrill Pub., 1979, "often the enforcement of the disciplinary codes is discriminatory."

ISSUE 6: Right to Subpoena Witnesses is of no Effect if They are not Available. Under Admission and Discipline Rule 23 of the Indiana Rules of Court Section 14(b) and (d) the Respondent shall have the right to attend the hearing in person, to be represented by counsel and to produce evidence and witnesses in his own behalf as in civil proceedings. Trial Rule 45 of the Indiana Rules of Trial Procedure gives the right of subpoena power. Under Amendment 6 to the U.S. Constitution, a defendant is entitled to compulsory process to obtain witnesses. Bill and Anne cannot obtain witnesses if

they are dead, disabled or if their whereabouts are unknown. They cannot obtain meaningful testimony in their behalf if their witnesses suffer from loss of memory or other disabilities that do not permit them to competently testify. Bill and Anne will be harmed in the hearing on the Disciplinary matters because even though they have the right of subpoena and compulsory process, the right is meaningless and a mockery if they cannot subpoena dead, disabled, whereabouts unknown witnesses, or witnesses who have lost their competency to testify and/or their memories during the long extended period involving this case, and, therefore, they are harmed by being denied a fundamentally fair hearing and a meaningful opportunity to be heard.

ISSUE 7: Cruel and Unusual Punishment -- Excessive Punishment.

Prohibitions have been placed on cruel and unusual punishment by Amendment

8 to the United States Constitution and by Article 1, Section 16 of the Indiana Constitution. Cruel and unusual punishment may be established by "deliberate indifference" according to Estelle v. Gamble, (1976) 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed 2d 251. This deliberate indifference leads to the unnecessary infliction of pain and other suffering. The Respondents have been in terrorem for at the most 7 years and at the least 3 1/2 years with the loss of their licenses to practice law which produces a traumatic experience leading to mental suffering, pain, anguish, anxiety, fear, loss of confidence, confinement in activities, loss of clients through publicity, degradation by other attorneys and judges, physical ailments. This extended and protracted period of terror has not been caused by their actions but by the deliberate indifference of the governmental entity, the Disciplinary

Commission and/or their representatives. Bill and Anne are harmed in their client relationships, personal and marital relationships, family relationships, mental pain and suffering, physical ailments, loss of confidence because of the neglect of resolution of this matter and they are harmed by the unequal treatment which they have received because of these protracted proceedings and because they are being punished excessively for the charges made against them. The harm is extraordingary in this case because research has not revealed one other disciplinary case in the United States in which the proceedings have been pending but delayed for such an extended time, without a hearing and where an attorney has been subjected to such disruption of legal practice, anxiety, suffering, curtailment of normal life, pursuit of happiness for such a long extended period of time.

ISSUE 8: Disciplinary Rules should apply to all lawyers regardless of gender, without regard to marital status and without presumption that a lawyer married to another lawyer necessarily will violate a particular disciplinary rule. The Preliminary Statement to the Disciplinary Rules (Book 2, page 291, Court Rules, Burns Indiana Statutes Annotated) provides that the Disciplinary Rules should be uniformly applied to all lawyers. Equal protection of the law is guaranteed by Article 1, Sec. 23 of the Indiana Constitution and by Sec. 1, Amendment 14 of the United States Constitution. The Disciplinary Rules are not being applied uniformly to Anne, as an attorney, since the charges made against her presume that she is guilty of a violation of disciplinary rules simply because similar charges are lodged against her husband. Anne is being harmed by the charges against her based on charges against her

husband and simply because she is his spouse her license to practice law is threatened with removal.

ISSUE 9: Per se Presumption of Guilt as Violating Presumption of Innocence. Florence Anne Briggs has been considered by the Disciplinary commission to be per se guilty of violations of the Disciplinary Rules merely because she is the spouse of William Briggs, and thereby the Commission is denying to her the presumption of innocence and the right to be determined innocent until her guilt is proved beyond a reasonable doubt as provided in Indiana Code 35-41-4-1. The per se presumption of guilt denies Anne equal protection of the laws as provided by the United States Constitution Amendment 14 and by Article 1, Sec. 23 of the Indiana Constitution and it is further a violation of the preliminary statement of the Disciplinary Rules that all lawyers should be uniformly treated in the

application of the Disciplinary Rules (Book 2, page 291, Court Rules, Burns Indiana Statutes, annotated). Anne is threatened with the loss of her law license because of charges against her growing out of alleged violations by Bill of the Disciplinary Code and in this result, she is being harmed.

Use of Disciplinary Proceedings to Interfere with Right of Attorney to Represent Client and Right of Client to Choose Representation.

ISSUE 10: By its Complaint, the Disciplinary Commission has through threat of loss of license attempted to interfere with the right of Florence Anne Briggs to represent clients and through complaint filed against Willaim Briggs has sought disciplinary sanctions against him for excercising his rights as private citizen to have attorney of his choosing.

Filed June 4, 1984

IN THE

SUPREME COURT OF INDIANA

| | | |
|---|---|---|
| IN THE MATTER OF<br>WILLIAM J. BRIGGS | ) | CAUSE NO. 1078 S 235 |
| IN THE MATTER OF<br>FLORENCE ANNE BRIGGS | ) | CAUSE NO. 783 S 262 |

ORDER DENYING RESPONDENT'S PETITION

Comes now the Respondents in these causes and jointly filed their "Presentation of Constitutional Issues and Errors, Petition for Hearing, Oral Argument, and Order of Determination, which pleading more fully appears in words and figures as follows, to-wit:

[H.I.]

And this Court, being duly advised in the premises, now finds that the relief

prayed for by the Respondents in this pleading should not be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that, in all particulars, Respondent's "Presentation of Constitutional Issues and Errors, Petition for Hearing, Oral Argument, and Order of Determination" is hereby denied.

The Clerk of this Court is directed to forward a copy of this Order to the Respondents, the Indiana Supreme Court Disciplinary Commission and the Honorable Douglas B. Morton, Judge of the Fulton Circuit Court and Hearing Officer in both these causes.

DONE in Indianapolis, Indiana this 4th day of June, 1984.

ss/_____
Richard M. Givan
Chief Justice of Indiana

Filed 12/6/83

IN THE SUPREME COURT

OF THE

STATE OF INDIANA

| | | |
|---|---|---|
| IN THE MATTER OF | ) | |
| | ) | Cause No. 1078 S 235 |
| WILLIAM J. BRIGGS | ) | |

MOTION FOR SEPARATION OF CAUSES

William J. Briggs, now shows the Court as follows:

1. In October of 1978, a Complaint in Cause No. 1078-S-235 was filed against William J. Briggs. The Disciplinary Commission did not proceed with a hearing and no hearing was ever held on that Complaint. An attempt to revive and amend the 1978 Complaint was made by an Amended Pleading filed in the same cause against William J. Briggs on or about July 19, 1983.

2. A grievance was filed against Florence Anne Briggs in the year 1977, but that grievance was found to be without merit and

and was dismissed. She was notified in 1978 that no complaint was to be filed against her.

3. Several years later a Complaint by Cause No. 783-S-262 was filed against Florence Anne Briggs on or about July 19, 1983. This Complaint against Florence Anne Briggs included some facts which are included in the original and/or Amended Complaints against William J. Briggs.

4. The inclusion of some facts from the original and Amended Complaints against William J. Briggs and the attempt to require that the Complaints against Florence Anne Briggs and William J. Briggs be consolidated and heard together is an attempt to justify trying William J. Briggs on facts in the original Complaint consisting of a stale Complaint against William J. Briggs.

5. William J. Briggs has filed heretofore a written Response To The Amended Complaint

against him which Response of William J. Briggs sets out ample reasons for the Supreme Court and the hearing officer to find and hold that the Amended Complaint is a stale Complaint against William J. Briggs. The Response of William J. Briggs to the Amended Complaint against William J. Briggs is incorporated herein by reference. It appears that the Supreme Court as of now has failed to act on the Response of William J. Briggs.

6. An allegation was made in a memorandum filed by David B. Hughes, Attorney for the Disciplinary Commission, in Cause No. 783-S-262 on or about September 22, 1983, asserting that "judicial economy" would serve as an excuse for trying the Amended Complaint in Cause No. 1078-S-235 against William J. Briggs and the Complaint in Cause No. 783-S-262 against Florence Anne Briggs at the same trial and/or hearing. It is called to the Court's attention that

"judicial economy" should not override the United States and Indiana Constitutional Rights of William J. Briggs and Florence Anne Briggs, the interested parties who will be most affected by these matters. The interests of the attorneys for the Disciplinary Commission should not override the interest of William J. Briggs and Florence Anne Briggs. The holding of one trial of these cases will be a serious overriding of the Constitutional Rights of William J. Briggs and Florence Anne Briggs and will be a definite showing of favoritism and prejudice in favor of the Disciplinary Commission, and prejudice and harm against William J. Briggs and Florence Anne Briggs.

7. Such disregard by the Disciplinary Commission as an Agency of the State of Indiana and the sanction and approval by the Supreme Court of the State of Indiana of the content and drafting of rules for

Disciplinary Matters and the arbitrary and capricious manner in which they are operated deny due process of law, fundamental fairness, and United States and State constitutional guarantees to William J. Briggs and Florence Anne Briggs, and as a consequence the interests of William J. Briggs will be greatly prejudiced by the consolidation of both cases as mentioned herein.

8. By the filing of an Amended Complaint against William J. Briggs, the Disciplinary Commission has attempted to revive a stale complaint against him which procedure is unlawful and is an attempt to circumvent its own rules. Even so the existing rules provide for a procedure and trial of complaints within a definite time frame. If the Court permits the Disciplinary Commission to override its own rules and the rights of Florence Anne Briggs and William J. Briggs, then the Indiana Supreme

Court will be illegally approving arbitrary and capricious actions on the part of the Disciplinary Commission which is in itself unconstitutional.

9. That a consolidated trial of the separate causes (Disciplinary Complaints) against William J. Briggs and Florence Anne Briggs will prejudice William J. Briggs and will cause him irreparable harm, as follows:

A. By the Court's failure to act upon and to take into consideration the RESPONSE OF WILLIAM J. BRIGGS TO THE COMPLAINT filed several months ago and the specific relief which he requested to be provided at a time before the trial, William J. Briggs is being denied due process of law which will be compounded by consolidation of these causes;

B. By the Court's failure to take into considertion the stale complaint and the attempt to revive it by way of an Amended

Complaint and the failure to treat this as an attempt to circumvent the defense of laches and the arbitary and capricious bending of the rules in disciplinary actions results in irreparable harm to William J. Briggs;

C. By consolidation, the Court will be creating a situation whereby the Disciplinary Commission will unlawfully seek to introduce facts to support stale allegations in the Amended Complaint which will prejudice the hearing officer and the Supreme Court against William J. Briggs. It should be recognized from the outset that it will be difficult for any Judge or hearing officer to remember all of the facts and to keep them separate, not only as to separate causes of action against two parties, but also to separate stale allegations from those which might not be stale. Even more so the attorney for the Disciplinary Commission is attempting to

set the trial of these causes at separate sessions rather than by a continuous trial which will further serve to confuse and compound the problems already existing by way of complex fact situations.

D. by allowing "judicial economy" to override constitutional rights of William J. Briggs; by failure to take into consideration the unreasonable long delay of many years on the part of the Disciplinary Commission; by failure to consider the defense of laches which is available to William J. Briggs; by requiring William J. Briggs to try a cause of action at a time when many of his witnesses are deceased and/or not available; by compounding these problems by the requirement of consolidation is not only error but is a denial of fundamental fairness to William J. Briggs.

E. By the requirement of consolidation, the Court is denying to William J. Briggs

the right to employ Florence Anne Briggs, his wife, either as counsel or as an assistant in the defense of his present cause of action. This presents the very real possibility that the Disciplinary Commission is attempting to gain consolidation of both Complaints so as to thwart and to impair the effectiveness of Florence Anne Briggs as an assistant for William J. Briggs by subjecting her to being tried at the same time and/or the same hearing;

WHEREFORE, William J. Briggs requests the Court to separate the two casues of action, the one against William J. Briggs being Cause No. 1078-S-235 from one against Florence Anne Briggs being Cause No. 783-S-262.

The undersigned says under the penalties of perjury that the above facts are true.

(ss)William J. Briggs
William J. Briggs
Attorney at Law
Post Office Box 2
Flora, Indiana 46929
Phone: 219-967-3631

## CERTIFICATE OF SERVICE

I certify that on the 6th day of December, 1983, I did deposit a copy of the above in the United States Mail properly addressed to: David Hughes, Room 800, 130 E. Washington St., Indianapolis, In 47975; to the Clerk of the Supreme Court State of Indiana, 217 State House, Indianapolis, In 46204; to the Clerk by Certified Mail.

(ss)William J. Briggs
William J. Briggs
Attorney at Law

Supreme Court, U.S.
FILED
JUL 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1976

WILLIAM J. BRIGGS,

*Petitioner,*

v.

INDIANA SUPREME COURT
DISCIPLINARY COMMISSION,

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA**

## BRIEF FOR RESPONDENT INDIANA SUPREME COURT DISCIPLINARY COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Sheldon A. Breskow
David B. Hughes
Indiana Supreme Court
Disciplinary Commission
814 I.S.T.A. Building
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Indianapolis, Indiana 46204

*Attorneys for Respondent*
Indiana Supreme Court
Disciplinary Commission

Central Publishing Company, Inc., Indianapolis, IN 46206

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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No. 86-1976

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WILLIAM J. BRIGGS,

*Petitioner,*

v.

INDIANA SUPREME COURT
DISCIPLINARY COMMISSION,

*Respondent.*

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## RESPONDENT'S BRIEF IN OPPOSITION

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### I.

### OPINION BELOW

The decision and opinion giving rise to Petitioner's Application for Writ of Certiorari were made and entered by the Supreme Court of Indiana on February 13, 1987. *In the Matter of William J. Briggs*, 502 N.E.2d 879 (Ind. 1987). The decision and opinion are set forth in Petitioner's Appendix at App. B1-46. The effect of the subject decision and opinion was to suspend Petitioner from the practice of law in the State of Indiana for a period of two years.

## II.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

## III.

## QUESTIONS PRESENTED

The Respondent will respond below in its argument to the questions presented by Petitioner which the Respondent feels warrant discussion. The questions the Disciplinary Commission do not address were found to be without merit on their faces.

## IV.

## STATEMENT OF THE CASE

Initial grievances were filed with the Indiana Supreme Court Disciplinary Commission ("Disciplinary Commission") in July 1977. After investigation, the Disciplinary Commission voted to file a disciplinary action against Petitioner on July 14, 1978. On October 24, 1978 a Verified Complaint For Disciplinary Action was actually filed. A Hearing Officer was appointed by the Supreme Court of Indiana on October 30, 1978, but the Officer failed to schedule the matter for hearing due to his involvement in another unrelated trial. Disciplinary Commission Attorney Hughes wrote two letters to the Hearing Officer in August and September of 1980, requesting pre-trial conference dates. After receiving no response, attorney Hughes suggested that the Disciplinary Commission attempt to obtain a new Hearing Officer.

Subsequently, the Hearing Officer became seriously ill and eventually died in the fall of 1981. At the time of his death he had not been relieved of his duties in this cause. Before a new Hearing Officer was appointed, additional grievances against Petitioner and his wife, who is also an attorney, were filed with

the Disciplinary Commission on April 9, 1981.

Prior to a complete investigation of the new grievances, a new Hearing Officer was appointed to the original cause on November 30, 1981. Petitioner objected thereto and a third Hearing Officer was appointed on February 24, 1982. After the second set of grievances were investigated, the Disciplinary Commission found reasonable cause and the Disciplinary Commission Executive Secretary was directed to file an Amended Verified Complaint on July 19, 1983. Because the trial of the initial grievance was not imminent, the Disciplinary Commission followed its usual procedure of combining the grievances into a single cause. At a December 16, 1983 pre-trial conference the Hearing Officer also ordered the trials of Petitioner and his wife joined and the trial was scheduled for April 24, 1984.

Petitioner's wife moved for and was granted a continuance on March 19, 1984 and the trial was rescheduled for July 12, 1984. The trial began on this date and ended on August 30, 1984. The parties then waived the 30 day reporting requirement for the Hearing Officer. The Hearing Officer filed his report to the Indiana Supreme Court on January 18, 1985, pursuant to Admission and Discipline Rule 23, Section 14(f). In said report, the Hearing Officer found that Petitioner had committed acts of misconduct and recommended the suspension of the Respondent from the practice of law in Indiana for a period of six months.

A review by the Supreme Court of Indiana of the findings and conclusions contained in the Hearing Officer's Report is provided for in Admission and Discipline Rule 23, Section 15(a). Petitioner petitioned for review of certain factual findings of the Hearing Officer on February 18, 1985 and the Disciplinary Commission likewise requested a review on August 19, 1985. The Court found on its review that the Petitioner had violated the Code of Professional Responsibility to such extent as to warrant's suspension from the practice of law in Indiana for a period of two (2) years.

Petitioner then filed a "Petition for Temporary Stay" which was denied on February 12, 1987. Subsequently a joint "Petition For Modification of Judgment" was denied on February 25, 1987.

## V.

## REASONS FOR DENYING THE WRIT

The Petitioner has attempted to present numerous questions which he feels warrant this Court's issuance of its extraordinary Writ of Certiorari. The Respondent responds only to those it feels warrant discussion.

The first issue to be considered is whether a defendant in an attorney disciplinary proceeding has a constitutional right to a "speedy" trial or to a trial "without delay". The Petitioner's brief cites numerous cases to support his claim that he is entitled to a speedy trial and that he was prejudiced by the delays that occurred. However, virtually ever one of his cited cases involved a criminal proceeding. The Sixth Amendment of the Constitution of the United States expressly is applicable only to criminal prosecutions and both this Court and the Supreme Court of Indiana have held that an attorney disciplinary proceeding is not a criminal prosecution. *In Re Ruffalo*, 390 U.S. 544, 551 (1968). *In Re Kessler*, 272 Ind. 161, 397 N.E.2d 574, 576 (1979).

If this Court finds that an attorney is guaranteed the right to a speedy trial under the Sixth and Fourteenth Amendments of the *United States Constitution*, then a balancing test such as that used in *Barker v. Wingo*, 407 U.S. 514 (1972), must still be applied to determine if the delay was prejudicial to Petitioner. *The Barker* balancing test weighs (1) length of delay; (2) the reason for delay; (3) the defendant's timely assertion of his right and; (4) prejudice occurring to the defendant. The first guidepost is given and the three remaining guideposts are addressed in following sections of this brief.

As to guidepost (2) set forth in *Barker*, Petitioner argues that the Disciplinary Commission unduly delayed prosecution of this matter and that as a result his right to due process of law under the Fifth and Fourteenth Amendments of the *Constitution of the United States* was violated. Petitioner claims that the seven (7) year delay in reaching trial can be blamed on the Disciplinary Commission. This argument is unsupportable. Petitioner himself caused the majority of delays that occurred and condoned the remainder until July 21, 1983 when the Hearing Officer ordered the cause set for a pre-trial conference. Examples of delays caused or condoned by Petitioner are as follows: (1) Petitioner's attorney and attorney Hughes of the Disciplinary Commission agreed to await the results of the pending civil litigation which gave rise to the first disciplinary complaint. All civil litigation was completed on December 9, 1980 which was nearly three and one half years after the initial grievance was filed. (2) Petitioner requested and received a four month extension to file a response to the second set of grievances filed against him on April 9, 1981. (3) After the death of the original Hearing Officer, the Petitioner objected to the appointment of a second Hearing Officer and a third Hearing Officer was not appointed by the Indiana Supreme Court until four months later.

As to guidepost (3) of *Barker*, it must be noted that at no time did Petitioner make a request for an expedited hearing. In addition from September 10, 1982, the date of approval of further proceedings by the Commission to July 19, 1983, the date the Amended Verified Complaint was filed, delays attributable to the Commission were all directly related to the individual workload and circumstances of Commission trial attorney Hughes.

As to guidepost (4) of *Barker*, the Petitioner argues that he was prejudiced and harmed by the delay in this proceeding which he incorrectly attributes to the Commission. The Hearing Officer's findings on this claim of prejudice are as follows:

> From all appearances, preservation of evidence in this matter was far easier than it might have been in a different

> type of case. The relationships of the parties while various documents were created, the contents of the documents and the pleadings and evidence submitted in the Court struggle make this case one where the record of events was, by its very nature, well preserved. Respondent was put on notice early that this action would result so he had ample opportunity to recall and preserve as much as necessary. Petitioner's App. at C-115.

Therefore, it is respectfully submitted that Petitioner has failed to present a question that requires this Court's review based upon the facts of this case.

The Petitioner's claim that he was denied a fair hearing due to the amount of time that elapsed from the filing of the 1977 grievance to the commencement of the final hearing is without basis in law or in fact. The Petitioner and/or his then counsel willingly condoned and participated in whatever delay occurred at least through July, 1982. The Petitioner's claim that the Disciplinary Commission was the sole cause of all delay is patently false.

The Petitioner also asserts that his First Amendment rights were violated by the application of Rule A.D. 23, Section 14. That Rule, among other things, prohibits the filing of dilatory motions or motions to dismiss after a Verified Complaint has been filed with the Supreme Court of Indiana. This argument by the Petitioner is not accompanied by relevant authority and is without merit. One need only review the Petitioner's pleadings in this cause, including his Petition for Review and the lengthy decision of the Hearing Officer on the constitutional issues raised by the Petitioner, to agree that the Petitioner has been afforded an adequate opportunity to litigate his constitutional claims as part and parcel of the final hearing and the review proceeding before the Indiana Supreme Court. The First Amendment requires no more than this. *Sekerez v. Supreme Court of Indiana*, 685 F.2d 202 (7th Cir., 1982).

Therefore, it is respectfully submitted that Petitioner has failed to present a question that requires this Court's review

based upon the facts of this case.

The final question that must be addressed is whether Petitioner was deprived of a fair and adequate opportunity to present his claimed constitutional issues at the final hearing before the Hearing Officer. He essentially claims a violation of his right to procedural due process. His argument is that the Indiana Supreme Court or the Hearing Officer should have bifurcated the final hearing to permit a separate hearing on constitutional issues. The above proposition is not supported by cogent argument or the presentation to this Court of any record showing how the Respondent's rights were affected adversely by any ruling of this Court or the Hearing Officer. As to bifurcation, he simply argues that because he requested bifurcation and did not receive it he was denied due process. He neglects to say how or why and he therefore has waived this argument.

Therefore, it is respectfully submitted that Petitioner has failed to present a question that requires this Court's review based upon the facts of this case.

## CONCLUSION

The decision of the Supreme Court of Indiana is correct. For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 86-1976

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

WILLIAM J. BRIGGS, Petitioner

V.

INDIANA SUPREME COURT
DISCIPLINARY COMMISSION, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF INDIANA

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# REPLY BRIEF OF PETITIONER ADDRESSED TO RESPONDENT'S BRIEF IN OPPOSITION TO WRIT

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Petitioner for Reply to Respondent's Opposition Brief says:

Respondent's position is that present case law does not make Speedy Trial Sixth Amendment Rights available in disciplinary cases. (Resp's Br.4,2d para.) It does not address the question: whether prolonged delay in disciplinary cases denies Due Process. A discussion of one without the other is incomplete.

## The Barker v Wingo Speedy Trial Factors Applied to this Case

Barker v. Wingo 407 US 514, 33 L Ed 2d 101, 33 2d 101 at 117,92 S Ct 2182 (1972)

Length of Delay. Respondent avoided discussing the ten year delay from the 1977 grievance to the 1987 judgment by a one word response, "Given" which means admitted. (Resp's Br 4, 2nd line from bottom)

Indiana Disciplinary Rule 23, section 13 provides that a **trial is to be held within 60 days** on a disciplinary complaint after appointment of the Hearing Officer. In this Briggs case **over 2000 days passed between appointment of the first Hearing Officer and the trial**. Both the Court and the Disciplinary Commission completely ignored and grossly violated its own rule.

SYNOPSIS OF DAYS PASSED

number of days between events

| | | | |
|---|---|---|---|
| -0- | 1st H.O. appointed | (10-30-78) | (Ev5) |
| 1025 | 1st H.O. died | (8-30-81) | (Ev11) |
| 90 | 2nd H.O. appointed | (11-30-81) | (Ev12) |
| 10 | Briggs requests change | (12-9-81) | (Ev13) |
| 75 | 3rd H.O. appointed | (2-24-82) | (Ev14) |
| 865 | Trial | (7-12-84) | (Ev25) |

Prejudice and Harm to Briggs

Respondent claims there was no prejudice since there was ample time to preserve evidence, (Resp's Br. 6,para.1) There was no opportunity to preserve evidence as to certain charges because they were not made until after some evidence was lost. The Petition for Writ at Part H pages 55 through 64 sets out many examples of prejudice. Because of the denials of Harm by Respondent, examples are included here. Lost evidence because of delay was severe and irreparable. Three key witnesses and at least 20 others were lost. The facts covered almost a 20 year span and with few exceptions witnesses indicated loss of memory. Mr. Breskow of the Commission cited this problem, and Peitioner found it extremely difficult to remember exact details from so long ago. Examples of delay-caused prejudice are cited:

Mary Bernice Smoker (deceased). This former client should have been the principal grievant and witness. Her death in 1979 prevented any deposition after the amended complaint filed in 1983 or the 2nd amended complaint in 1984 or the trial in 1984. Briggs was found guilty of delay in termination of her guardianship which ended long before her death. The charges were not made until after she died. There was no opportunity whatsoever to preserve her testimony on some matters, but even in her deposition she could not remember making three rather than two wills.

Bertha Wolfe (elderly, ill and in Arizona). Mrs. Wolfe was a long-time secretary in the Briggs law office at the time the 1968 and 1970 Smoker wills were written. The complaint was amended in 1984, so that some charges were based upon the old-pre-1970 ABA Canons as to events between 15 and 20 years ago. There was no

opportunity to preserve evidence after the this last amended complaint. Mrs. Wolfe would have been invaluable in the Briggs defense where he was required to disprove that he did not make "full disclose" to Smoker -- under the extremely vague and uncertain standards of the old Canons. (See Petr's Br. 60 et seq) James Stewart, deceased. The Commission did not file the amended complaint until one month after the death of Mr. Stewart and his testimony was lost forever. He had interviewed Mr. Arthur Schenck who was the primary witness for the Commission on the charge (which was upheld) that Briggs communicated with others. Stewart's death prevented him from rebutting Schenck's testimony and his garbled version because of failing memory. Alleged Stewart-Hughes Agreement. Stewart could also have rebutted the claim that there was a Stewart-Hughes Agreement. Respondent's

allegation that the Petitioner, "caused the majority and condoned the remainder" of all delays which occurred up to July 21, 1983 (Resp's Brief 5, line 11) is based upon the uncorroborated oral claim of Attorney Hughes that he and James Stewart, attorney for Petitioner, had a private and unofficial agreement to wait until the end of the Smoker Civil Trials. (Resp's Br 5,line 12) There is no agreed entry or pleading signed or filed by Stewart in the records of the case at the Court.***If there had been such a private agreement between attorneys Hughes and Stewart, then most assuredly, Mr. Stewart as a careful attorney would not have made such an agreement without written authorization from his client. Briggs did not authorize it, and there is no written authorization.***And further if there had been such an agreement, then the Disciplinary Commission should have lived

up to it. But it did not. Smoker trials did not end until December 9, 1980, (Resp's Br. 5, para.1 Ev #10) yet the Commission proceeded on the basis that there was no such agreement when it wrote letters in July and September of 1979 to the First Hearing Officer to secure pretrial conference. The Commission wrote a second set of letters to the Hearing Officer again in 1980 and again proceeded as if there were no agreement. The four letters were made exhibits at the trial of the disciplinary case. (Petr's Exhs 92,93,104, & 105).***Event #17 shows members of the Commission directed Commission Secretary Breskow and Attorney Hughes to file an amended complaint on September 10, 1982. (Resp's Br 5, 2nd para line 3) At that time James Stewart was still alive. This important witness did not die until June, 1983. (Ev 18), and

shortly thereafter in July of 1983, the amended complaint was filed. Mr. Hughes waited for 10 months after he was authorized but then immediately after the death of Stewart filed it. (See Resp's Br. 5 2nd para line 4) (Events #17,18, & 19) James Stewart died before the trial, and thus he could not testify as to the veracity of the alleged agreement.

Assertion of the Right. No pleadings were filed by either the Disciplinary Commission or the Petitioner specifially requesting that the proceedings be expedited. (Pet 9,2d para.)

In Barker v. Wingo 407 US 514, 33 L Ed 2d, 101 92 S Ct 2182, the court stated, "...a defendant has no duty to bring himself to trial; the state has that duty..."and at 116 stated "the primary burden (is) on the courts and the prosecutor to assure that cases are brought to trial."

Presumption of Prejudice--Long Delay

Although a Petitioner may be seriously prejudiced by delay, he may not be required to prove it, since courts realize that he may not be able to do so. The Indiana Court of Appeals in Scott v State 461 N.E.2d 141 (1984) in adopting Barker at pages 143 and 144 said, "There is a general presumption against mere passage of time as prejudicing a defendant...However the delay may be so prolonged (that) the general presumption must fail and be replaced by a presumption of prejudice. The basis for the contrary presumption of prejudice is the delay itself deprives the defendant of the ability to prove prejudice."

Petitioner raised Delay, Speedy Trial Due Process Issues along with 1st Amendment Redress Rights in his Answer to the Amended Complaint filed in August, 1983. The Commission, the Court and the

Hearing Officer all totally ignored him. Realizing he was being ignored,Briggs filed a Petition with the Court and Hearing Officer on May 7, 1987. It requested a hearing and oral argument before the Court and Hearing officer on Rights issues. (Petition is at App.F-1 & Ev #22).

The Indiana Supreme Court entered a one page cursory Order of Denial.

Ind. R. A. D. 23, Sec. 24 provides, "...no motion to dismiss or dilatory motion shall be entertained...."

The cursory Order from the Indiana Supreme court treated the Petition relating to serious Constitutional Issues as a dilatory motion. (See App.F34) Petitioner Briggs never was permitted to have an oral hearing on Constitutional issues before the the Indiana Supreme Court. Even the Hearing Officer refused to bifurcate the Trial or allow a separate hearing on the

numerous Constitutional Issues raised. (App.F1 et seq) The trial was lengthy, and harried, under extreme time pressure, arose out of complicated issues and huge amounts of facts covering the last 20 years. It was difficult for the witesses as well as for lawyers to remember and cordinate facts and circumstances. Under these circumstances Petitioner was compelled to attempt to obtain consideration on Constitutional infirmities.

It was an act of futility. In short, it was unfair. Petitioner was denied a meaningful hearing on Constitutional Infirmities and a Due process guaranteed fair trial. The prolonged delay denied him the opportunity to make an adequate defense.

Cause of Delay--Detailed Analysis
With Reference to Table of Events

Respondent unjustifiedly alleged that Petitioner caused the majority of delays. Resp's Br.5 line 8).

The First Thirty-Three Months. The Grievance was filed with the Commission in July of 1977. (Ev.#1) The Complaint was filed with the court in October 1978. (Ev. #4) Briggs filed his Answer to the complaint in court 30 days later, November 24, 1978. (Ev.#6) The First Hearing Officer, Staffeldt, died on August 30, 1981. (Ev.#11) 15 months passed from Grievance to filing of the complaint and only 1 month passed until Briggs Answered the Complaint. This must be added to the 33 months from the Briggs Answer to the death of the Hearing officer. Already 49 months had passed. Respondent says that the only action taken by the commission during the 33 months period was the writing of two letters and discussions with attorney and client. (Resp's Br 2, under IV,para.1) Attorney Hughes says he suggested to his client that it attempt to obtain a new Hearing Officer. (Resp's Br 2

under IV). Discussions by an attorney with his own client do not constitute any official legal action. The Docket Sheet shows no activity. Respondent fails to show that it filed any pleading with the court during the 33 months period ending on August 30, 1981. (Resps's Br 2, under IV)

During the Thirty-nine Months. The first Hearing Officer died on August 30, 1981 (Ev.# 11) The vacancy was not filled by the Court until November 30, 1981 (Ev.#12 Briggs promptly filed for change of Hearing Officer about 10 days later on December 9,1981 (Event #13) The Court removed this Hearing Officer but did not appoint another until about 2 & 1/2 months later on Febrary 24, 1982. (Ev.#14) The Commission notified Briggs in June of 1982 that the 2nd set of grievances officially had been docketed for investigation by the Commission.

Briggs promptly filed on July 3, 1982 a Supplemental Response with the Commission. (Ev. #15 & 16) Members of the Commission did not meet until September 10, 1982 to authorize filing of an amended complaint. Even though its filing was authorized at that time, the complaint was not filed until about 10 months later on July 19, 1983. (Ev #17 & 19) . Petitioner objected to the court's setting off the trial from April 1984 to July 1984 and to joining husband and wife in one trial.

Respondent admits that the delay of 10 months (between September 10, 1982 when the complaint was authorized and July 19, 1983 when the complaint was actually filed) was caused by case workload and problems of Attorney Hughes. However he is not the only attorney for the Commission, and if he were dead, another attorney would have tried the case.

In the Barker concurring opinion 33L.E.2d 101 at 121, Justice White and Brennan state," unreasonable delay in run-of-the-mill criminal cases can not be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that each must await its turn"

The documented facts show that Petitioner did not cause the majority of the delays. The facts show that the court and the Disciplinary Commission ~~and the Disciplinary Commission~~ should be held accountable for the over-all delay.

CONCLUSION

There is a need, and it is timely for the Court to accept a case dealing with Constitutional rights of lawyers.

This case contains questions of law which are of widespread interest, and the facts and prolonged delay with attendant prejudice make it appropriate for acceptance.

The petitioner respectfully requests the Court to accept this case and grant the writ in order to clarify the confusion in the Circuits and the States and assist in the building of a more certain body of rights for all lawyers in the United States

Respectfully Submitted

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## TABLE OF EVENTS

(1) 7/8/77
Grievance filed at Commission

(2) 7/14/78
Commission authorized filing of complaint in Ind. Sup. Ct.

(3) 10/77
Deposition of Mary Bernice Smoker taken

(4) 10/24/78
Complaint filed in Ind. Sup. Ct.

(5) 10/30/78
First Hearing Officer (Staffeldt) appointed by Ind. Sup. Ct

(6) 11/24/78
Briggs filed Answer to Complaint in Ind. Sup. Ct.

(7) 7 & 9/1979
Commission wrote letters to Hearing Officer before Smoker litigation ended

(8) 11/21/79
Death of Mary Bernice Smoker

(9) 8 & 9/80
Commission wrote other letters to Hearing Officer before Smoker litigation ended

(10) 12/9/80
All Smoker trials ended after Commission wrote letters to Hearing officer

(11) 8/30/81
Death of First Hearing Officer (Staffeldt)

(12) 11/30/81
2nd Hearing Officer (Wright) appointed by Ind.Sup.Ct.

(13) 12/9/81
Briggs promptly filed within 10 days
Motion for Change of Hearing Officer

(14) 2/24/82
3rd and Final Hearing officer (Morton)
appointed by Ind. Sup. Ct

(15) 6/82
Ex. Sec. of Disciplinary Commission
notifed Briggs that 2nd set of grievances
filed by the same grievants had been
docketed (officially scheduled) for
investigation by Commission

(16) 7/3/82
Briggs promptly filed with Commission his
Supplemental Response to the 2d set of
grievances at Commission

(17) 9/10/82
Commission members authorized Ex.Sec.
Breskow and its attorney Hughes to file
amended complaint

(18) 6/83
Death of James Stewart, long time attorney
and important witnesses for William Briggs
and Florence Anne Briggs

(19) 7/19/83
Amended Complaint was filed about 1 month
after death of James Stewart but not until
10 months after it was authorized by
Commission Members (see Events #17 & #18)

(20) 9/19/83
Briggs filed Answer (Response) to Amended
Complaint at Ind. Sup. Ct. raising delay
and other Constitutional Issues requesting
Hearing

(21) 3/19/84
Briggs filed objection to Hearing Officer's grant of continuance setting off trial from April 24, 1984 to July 12, 1984.

(22) 5/7/84 (Appendix F-1)
Briggs filed Petition with Ind. Sup. Ct. and Hearing Officer raising Question of Delay and other Constitutional Issues and requesting Hearing and Oral Argument

(23) 6/4/1984 (Appendix F-34)
Ind. Sup. Ct denied Briggs Petition listed as Event #22.

(24) 6/84
2nd Amended Complaint filed against William Briggs about one month before trial commenced on July 12, 1984

(25) 7/12/84
Trial Started 7-12-84 and Ended on 8-30-84

(26) 1/18/85
Hearing Officer Morton filed Hearing Officer's Report with Ind. Sup. Ct. Both sides had agreed for Judge Morton to have additional time to make his report.

(30) 1/13/87
Judgment entered by Ind. Supr. Ct.